ESTATE ADMINISTRATION

REPORT FOR DISCUSSION 22

SEPTEMBER 2011

ISSN 0834-9037

ISBN 1-896078-47-8

Invitation to Comment

Deadline for comments on the issues raised in this document is November 30, 2011

This Report for Discussion by the Alberta Law Reform Institute [ALRI] raises issues relating to the administration of the estate of a deceased person and the role and responsibilities of the personal representative administering the estate.

The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider these proposals and to make their views known to ALRI. You may respond to one, a few or all of the issues raised. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

You can reach us with your comments or with questions about this document on our website, by fax, mail or e-mail to:

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Law reform is a public process. **ALRI assumes that comments on this Report for Discussion are not confidential.** ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although we usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, you may request confidentiality in your response or you may submit comments anonymously.

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Alberta Law Reform Institute

The Alberta Law Reform Institute was established on January 1, 1968 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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This and other Institute reports are available to view or download at the ALRI website: www.alri.ualberta.ca.

Acknowledgments

Our review of the *Administration of Estates Act* has benefitted greatly from the feedback and advice of an accomplished Project Advisory Committee. The Committee's opinions have assisted both ALRI counsel and the ALRI Board in making recommendations for reform. We express our gratitude to the members of this Committee:

Anne S de Villars QC, de Villars Jones
Honourable Judge Charles D Gardner, Provincial Court
Janice Henderson-Lypkie, Lypkie Henderson
Peter JM Lown QC, Alberta Law Reform Institute
Averie J McNary, Alberta Justice
Honourable Justice Bonnie L Rawlins, Court of Queen's Bench

We are also grateful to all the lawyers, Canadian Bar Association (Alberta) Sections who took the time to provide us with their input during the early stages of this project. The quality of the feedback which we received from them significantly assisted ALRI in identifying appropriate issues for consultation.

Several ALRI counsel have contributed to the preparation of this Report for Discussion. Research and analysis for the report was carried out by Cheryl Hunter Loewen, Maria Lavelle, Peter Lown, Donna Molzan, Sandra Petersson, Elizabeth Robertson and Geneviève Tremblay-McCaig.

Peter Lown and Sandra Petersson were responsible for project management. Ilze Hobin prepared the report for publication. Student research assistance was provided Anna-May Choles, Jill Gamez, Suzette Golden, Gabrielle Maunier, Kurtis Streeper and Lara Yeung.

Summary

CHAPTER 1 OVERVIEW

Estate administration is the job of gathering the assets of the deceased, paying the debts and distributing the estate to the persons entitled by will or the intestate succession legislation.

Often the personal representative [PR] will be a family member who may have no previous experience of such a job and will also be dealing with the death of a family member at the same time.

Surveys have found that the job of a PR is not well understood and there is little information available to help.

This Report for Discussion proposes key changes to improve the process of estate administration in Alberta and invites your comments on the proposals.

- First, it proposes that a PR, whether appointed by a will or on intestacy, have the power to act from the death.

- Second, it proposes to set out clearly the values that the PR must follow in administering an estate. The PR must act with a duty of care, administer the estate in a timely manner, and maintain communication.

- Third, it proposes to outline a clear and rational statement explaining the process of estate administration and the PR's core tasks. The starting point for this statement will be the current list of the PR's core tasks in the *Surrogate Rules*.

- Finally, it stresses the importance of communication by the PR to the beneficiaries, creditors and others. Communication arises in all aspects of the PR's job. The process of administering an estate is made easier for the PR and all involved if communication is open and effective.

CHAPTER 2 A PR'S AUTHORITY TO ACT FROM DEATH

Issue 1 Should an administrator have authority to act from the time of death?

Under the current law in Alberta, when there is no will (intestacy), an administrator must be appointed by the court to act as PR before any tasks associated with the estate can be completed. Where an executor has been appointed under a will, the authority comes from the will and the executor is able to act as PR without first obtaining authority from the court. Thus, in many cases, it will be easier for the PR appointed under a will to complete preliminary tasks following the death.

ALRI recommends that an administrator should have the same authority to act from the date of death as an executor. It has long been a goal in the law of estate administration to eliminate the differences between the offices of executor and administrator.

The *Surrogate Rules* set out a hierarchical list of the persons who are eligible to apply to be the PR where there is no will. The person (or persons) at the highest level in the hierarchy who agreed to act would be able to start carrying out the tasks of the PR from the date of death. For some estates involving land and more complex estates, a formal grant of authority may still be required to confirm the authority of the PR. However, this recommendation will allow some estates on intestacy to be administered more quickly or without a court application.

CHAPTER 3 VALUES THAT GOVERN A PR'S ACTIONS

In the course of administering an estate, a PR must act as a fiduciary, conduct the administration in a timely manner, and communicate with beneficiaries and other interested persons. It appears that the importance of adherence to these values is not well understood by PRs. There are a number of cases in which PRs have been in breach of their fiduciary duties by, for example, failing to account to beneficiaries, taking property or monies that belong to the estate, or paying themselves excessive management fees. In addition, there are recent cases where the courts have chastised PRs for delay and poor communication.

Issue 2 Should the Act contain an express statement that the PR must exercise a duty of care?

As a fiduciary, a PR is required to act loyally in putting the interests of all the beneficiaries before his or her own interest. The PR must act for the benefit of others, must not profit from the role, and must act honestly and in good faith. At present, the fiduciary nature of the PR's role is not set out in the legislation. ALRI recommends that the legislation contain a statement that a PR must act honestly, in good faith, in the best interests of the beneficiaries and must exercise the care and skill that a reasonable and prudent person would exercise in comparable circumstances.

Issue 3 Should the Act contain an express statement that the PR must administer the estate in a timely manner?

Under the common law, a PR is required to administer an estate without undue or unreasonable delay. In some cases, the courts apply the concept of the executor's year which allows the PR one year from the date of death to administer and distribute the estate assets. While there is no legislative provision in Alberta which addresses delay on the part of a PR, there are provisions in other provinces and other jurisdictions. In Australia, a national committee overseeing reform of the law of succession has recently recommended that the PR should be under a duty to distribute an estate as soon as practicable. ALRI recommends that a provision be placed in the new Act requiring the PR to perform his or her functions in a timely manner. The provision would serve to stress the importance of prompt estate administration.

Issue 4 Should the Act contain an express statement that the PR must communicate openly with beneficiaries and other interested parties?

Communication plays a very important role in the administration of an estate. PRs must communicate with beneficiaries, financial institutions, other family members, creditors, and other interested persons in order to complete the job. Good communication helps to ensure that the process of administration runs smoothly. Keeping beneficiaries and other interested persons informed can reduce the likelihood of disputes arising. It is very important that communication be included as a value. Accordingly, ALRI recommends that there be a provision in the new act that a PR must communicate.

CHAPTER 4 THE PR'S ROLE

Issue 5 Should the PR's core tasks be outlined in the Act?

In order to perform the job, a PR must carry out various functions. Within each function, there are various tasks to be completed. Although some are set out in the *Surrogate* Rules, ALRI considers that a description of the functions will be very useful in assisting PRs in understanding the nature and extent of their duties. This will not be an exhaustive list but an outline of the core functions to be performed. Of course, the PR will remain subject to any other duties imposed by the law.

The central functions performed by the PR are collecting the estate, paying debts, administering the estate and distributing the estate to the beneficiaries. The collection of the estate involves determining the assets and liabilities of the deceased. The PR must pay any debts and fulfil any outstanding obligations of the deceased in order to "net" the estate. Before distribution, the PR must administer the estate which may include managing property and investments. Finally, the PR distributes the property to the beneficiaries in accordance with the will or pursuant to the statutory scheme for intestacy. ALRI recommends that the legislation clearly articulate the core functions of the PR.

Issue 6 Should preparing an inventory of the deceased's property be included as a core task?

At common law, the PR is required to have accounts available for inspection. Implicit in fulfilling this obligation is the concept that the PR must have appropriate records from which such accounts can be drawn. Creating an inventory, and recording changes in that inventory, is a fundamental part of record keeping and accounting.

Issue 7 Should creating and maintaining records be included as a core task?

As most PRs are lay persons, it would be beneficial to ensure that they are under a duty to prepare an inventory and maintain records. ALRI recommends that a new Act contain a section requiring the PR to prepare an inventory and maintain the necessary documents.

Issue 8 Should providing financial statements be included as a core task?

Under *Surrogate Rule* 97, the PR must give financial statements, including a statement of assets and liabilities, to the beneficiaries at two yearly intervals after the date of death. ALRI recommends that this provision be placed in the new *Act*.

Issue 9 Should it be mandatory to advertise for creditors or other claimants?

Issue 10 Where should the PR advertise for creditors?

At present, the advertisement is placed in newspapers where the deceased resided. It may be questioned whether this type of advertising is an effective means of notifying creditors. An alternative would be placing the advertisement in the provincial Gazette. ALRI seeks input as to the effectiveness of continuing with the current scheme of advertising in local newspapers.

Issue 11 Should "claimant" be defined?

A PR may advertise to give notice to creditors and claimants. The purpose of this notice is to inform these persons of the death and the contact information for claims against the estate. It is not mandatory in Alberta that the PR advertises. However, advertising enables the PR to distribute the estate without being personally liable for claims of which the PR did not have notice at the time of distribution. At present, "claimant" is not defined in the Act. It is recommended that a definition be placed in the Act. It is also recommended that advertising continue to be left to the discretion of the PR.

Issue 12 Should disposing of the body be included as a core task?

Arranging for disposal of the body is an important function which must be completed immediately. At common law, the executor under a will has the authority to take possession of the body and make funeral plans. This provision was carried through into Alberta legislation that sets out a complete scheme for who should have authority to dispose of a body. As disposing of a body is adequately dealt with in other legislation it need not be included as a core task if the PR holds authority under the other legislation. However, we seek views on how the two pieces of legislation might be better coordinated.

CHAPTER 5 COMMUNICATION

Issue 13 What information should the PR provide to beneficiaries of the deceased's estate?

When an application for a formal grant is made, beneficiaries under a will and beneficiaries on intestacy are given notice of the application. The notice alerts the beneficiaries to the need to monitor the administration of the estate. In situations where a formal grant is not sought, there is no requirement to give notice. Beneficiaries are unable to monitor the administration or enforce their rights if they are unaware that they are entitled to estate property. ALRI recommends that a PR be required to give notice to all beneficiaries regardless of whether or not an application for a formal grant will be made.

Issue 14 Should all beneficiaries receive a copy of the will?

When applicable, a copy of the will must be given to residuary beneficiaries. We recommend that PR will have the discretion to provide specific beneficiaries with a copy of the will. In addition, the PR will have the discretion to give notice to family members who have not been provided for in the will. In some cases, administration of the estate will be facilitated by such notification.

Issue 15 Should regular reporting to beneficiaries be included as a core task?

Under the common law, communication with beneficiaries is relatively limited. The beneficiaries have a right to inspect the accounts of the PR and can also apply to the court to have the accounts approved. Under the *Surrogate Rules*, residuary beneficiaries receive a copy of the will and the inventory when an application for a formal grant is made. Likewise, beneficiaries on intestacy receive a copy of the inventory when an application is made. In addition, PRs are required under the *Surrogate Rules* to give beneficiaries copies of financial statements at regular intervals. Finally, interested persons, including beneficiaries, can apply to the court to have the accounts formally passed.

In our view, communication with beneficiaries would be improved if PRs were required to give them progress reports on the administration at regular intervals. This requirement would be in addition to the common law right of inspection. ALRI recommends that the new *Act* include a provision that a progress report be given at six months following the death, at one year following the death and at

subsequent yearly intervals. This recommendation dovetails with the recommendation to be made below with respect to notices to be given to beneficiaries.

Issue 16 Should the PR be required to provide notice to immediate family members of the deceased who are not will beneficiaries?

A difficult issue is whether a PR should be required to give notice to immediate family members who are not beneficiaries and who do not qualify as dependants or claimants under other legislation. These situations are likely to exist either because of arrangements made outside a will or intestacy (e.g. beneficiary designations) or because of family dynamics (e.g. lost contact or deliberate disinheritance). Mandatory notice would insert the PR into those dynamics. As a result, ALRI recommends that notice to this group of persons should remain a matter of discretion for the PR.

Issue 17 Should the PR be required to communicate with other interested persons?

At present, a PR is required to provide some interested persons, other than beneficiaries, with notice as will be discussed below. In addition, interested persons may bring a court application to have the PR's accounts formally reviewed. It may be questioned whether an interested person should have any further ability to obtain information. For example, in Manitoba, an interested person is able make a written request to the PR. Interested persons, such as creditors and family relief applicants, have concerns which are opposed to the beneficiaries and the estate. ALRI recommends that a PR should have the discretion to accept or reject requests. The interested person will retain the ability to bring a court application should a request for information be rejected by the PR.

CHAPTER 6 BANKS AND FINANCIAL INSTITUTIONS

Issue 18 What should be done when a financial institution asserts privacy concerns in refusing to provide information to a PR?

PRs must communicate with banks and financial institutions. The PR must obtain information about the deceased's assets and must have access to assets in order to distribute those assets. Consultations have revealed that PRs experience difficulties in dealing with financial institutions. Often, the institution will insist on a formal grant before releasing any information citing privacy concerns. It is anticipated that placing a provision in the new *Act* that a PR has authority to

begin estate administration from the date of death, as recommended in chapter 3, will resolve this issue. It will be necessary to ensure that financial institutions are aware of and understand this new provision.

Issue 19 Should anything be done to facilitate the release of assets held by a financial institution? What is a reasonable delay on the part of financial institutions?

In relation to release of assets, it is reasonable for financial institutions to insist on a formal grant or guarantees out of concerns about fraud and their own potential liability. In addition, it is reasonable for there to be some delay and the length of the delay will depend upon the particular circumstances. ALRI concludes that there is no need for legislative reform in this area.

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The Succession Project

This report represents one of the concluding stages in ALRI's Succession Project. In this report, the Institute is looking to reform the *Administration of Estates Act* and, later, in a following report, to update the *Surrogate Rules*. The issues identified in need of reform were largely drawn from a survey conducted by the Alberta Department of Justice in 2009 and a subsequent survey of CBA (Alberta Branch) Wills Section members, jointly sponsored by the Alberta Department of Justice and ALRI in May 2010. The proposals contained in this Report for Discussion were developed on the advice of an ALRI Project Advisory Committee and on the approval of the ALRI Board. They are not final recommendations and are intended for consultation and comment by the public.

ALRI has conducted numerous projects over the years to review various aspects of the law of succession and has made many recommendations for reform.[1] Most recently, ALRI produced its final reports, *Creation of Wills* and *Wills and the Legal Effects of Changed Circumstances* which facilitated the introduction of new wills legislation in Alberta.

After the consultation process is concluded, ALRI will produce a Final Report with our recommendations on how to reform the *Administration of Estates Act*.

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[1] Previous ALRI Reports which are currently relevant to succession law are:
Report 47, *Survivorship* (1986)
Report 60, *Status of Children: Revised Report, 1991* (1991)
Report 68, *Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act* (1993)
Report 72, *Effect of Divorce on Wills* (1994)
Report 78, *Reform of the Intestate Succession Act* (1999)
Report 83, *Division of Matrimonial Property on Death* (2000)
Report 84, *Wills: Non-Compliance with Formalities* (2000)
Report for Discussion 14, *The Matrimonial Home* (1995)
Report for Discussion 17, *Division of Matrimonial Property on Death* (1998)
Report for Discussion 19, *Order of Application of Assets in Satisfaction of Debts and Liabilities* (2001)
Report 87, *Report on a Succession Consolidation Statute* (2002)
Report 92, *Exemption of Future Income Plans on Death* (2004)
Report for Discussion 20, *The Creation of Wills* (2007)
Report 96, *Creation of Wills* (2009)
Report 98, *Wills and the Legal Effects of Changed Circumstances* (2010)

Table of Abbreviations

LEGISLATION

Canada	
Alberta	
Act	*Administration of Estates Act*, RSA 2000, c A-2
Rules	Alberta, *Surrogate Rules*
WSA	*Wills and Succession* Act, SA 2010, c W-12.2
Federal and Other Provinces	
Manitoba Act	*Court of Queen's Bench Surrogate Practice Act*, CCSM, c C290
Newfoundland Act	*Judicature Act*, RSNL 1990, c J-4, Part VI
Nova Scotia Act	*Probate Act*, SNS 2000, c 31
Nova Scotia Regs	Nova Scotia, *Probate Court Practice, Procedure and Forms Regulations*, NS Reg 119/2001
WESA	*Wills, Estates and Succession* Act, SBC 2009, c 13 (not yet in force)
Australia	
Queensland Act	*Succession Act 1981* (Qld)
England	
UK Act	*Administration of Estates Act, 1925*(UK), c 23, s 25
United States	
UPC	UCC Uniform Probate Code (2006)

LAW REFORM PUBLICATIONS

British Columbia Succession Report	British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report 45 (2006)
British Columbia Probate Report	British Columbia Law Institute, *Report on New Probate Rules*, Report 57 (October 2010)
Nova Scotia Report	Law Reform Commission of Nova Scotia, *Probate Reform In Nova Scotia*, Final Report (1999)

New South Wales Report	New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of the Estates of Deceased Persons*, Report 124 (2009)
Ontario Report	Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (1991)
Queensland Report	Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, v 1 Report 65 (2009) at 11.21

SECONDARY SOURCES

Feeney	J MacKenzie, ed, *Feeney's Canadian Law of Wills*, 4th ed, looseleaf (Markham, Ont: Butterworths Canada, 2000)
Widdifield	Carmen S Thériault, ed, *Widdifield on Executors and Trustees*, 6th ed, looseleaf (Scarborough, Ont: Carswell, 2002) (WL Can)

CHAPTER 1

Overview

A. Need for Reform

[1] Estate administration involves collecting the assets of a deceased person, paying their debts, and managing any remaining assets until they are distributed to the deceased's beneficiaries. The personal representative [PR] is the person who is charged with the responsibility of administering the estate, either according to the deceased's wishes as expressed in a valid will or according to intestacy legislation. A person appointed as PR may also be one of the beneficiaries under a will or intestacy. The PR may have little experience and may not be prepared for the important responsibility of administering the estate. Further, PRs may also risk personal liability if they do not properly discharge their responsibilities.

[2] Accordingly, it is important that the law governing the administration of estates be clear, accessible and rational. Depending on the nature and complexity of the assets, the PR may either distribute the estate without court approval or seek a formal grant of authority from a court before the estate is distributed.[2] Regardless of the approach taken, there are a number of functions that a PR must carry-out and communications that must be made before the administration of an estate can be completed.

[3] A May 2010 survey of Alberta wills and estates lawyers identified problems with PRs understanding of their role. As one correspondent said, PRs "often don't know what to do, [there] seems to be a lack of information and knowledge from sources they have to deal with; often while dealing with their own bereavement issues."[3] In addition to

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[2] Except where the context requires, this report does not distinguish between estate administration carried out under a formal grant of authority and that done on an informal basis. However, the nature of some assets will require a formal authority. For example, the Land Titles Office requires formal authority where the estate consists of land. Banks or other financial institutions may also insist on a formal authority before they will release assets to the PR.

[3] Alberta Justice Legislative Reform, *Results from the Administration of Estates Survey* (June 2010) at 4. This was a joint initiative with the Alberta Law Reform Institute. The survey was sent to members of the Canadian Bar Association, Alberta Branch, Wills and Estates Sections.

perceived shortcomings of the legislation in Alberta, the role of a PR is poorly understood across Canada. The Bank of Montreal conducted a survey that asked middle-aged Canadians about their understanding of the duties of a PR. The results of the survey suggest that there is a great deal of confusion and misunderstanding on the part of the general public regarding what a PR is supposed to do, the length of time involved, and other aspects of estate administration.[4] There are also a number of recent cases in which PRs have been found to have acted incompetently in administering an estate.[5]

[4] However, a PR would find little guidance in the current legislation governing estate administration in Alberta. The *Administration of Estates Act* does not clearly set out the values that should govern a PR's behaviour or the core functions and tasks they must perform.[6] The Act remains relatively unchanged since it was first introduced in 1969.

[5] Further, people often appoint friends or family members as the PR, so often the PR must undertake estate administration duties while coming to terms with the death of a loved one. There is no doubt that a PR who is grieving will be affected "mentally, emotionally, physically, behaviourally and spiritually."[7] Although the degree to which any particular PR will be affected cannot be predicted, if the bond between the PR and the deceased is strong it is likely that the PR will experience intense grief.[8] Thus, most friends or family members who take on the PR role will suffer to some extent from the frequent side effects of grief such as: confusion and sense

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[4] Bank of Montreal & Ipso Reid Survey, "Boomers Baffled about What it Means to be Executor of a Will" (May 2007), online: CNW Group <http://www.newswire.ca/en/releases/archive/June2007/13/c3940.html>.

[5] See for example: *Roberge v Roberge Estate*, 2004 MBQB 151; *Loftus v Clarke Estate*, 2001 BCSC 1136; *Laird v Lyne Estate*, 2004 BCSC 39; *Re Lowe Estate*, 2002 BCSC 813; *McClellan v. Pearase*, 2005 MBQB 289; *Kesler v Podlowski*, 2005 ABQB 229; *Harrison v Zelezniak*, 2008 MBQB 8; *Cordeiro v Kulikovsky* [2003] OJ No 2668 (Sup Ct J).

[6] *Administration of Estates* Act, RSA 2000, c A-2 [the Act]. While s 58 teases with the heading "The Role of the PR", it merely states that the PR has all the powers of an executor, but nowhere is the role of an executor explained or defined.

[7] Lynne Ann DeSpelder & Albert Lee Strickland, *The Last Dance: Encountering Death and Dying*, 8th ed (New York: McGraw-Hill Companies, 2009) at 313.

[8] John Archer, *The Nature of Grief: The Evolution and Psychology of Reactions to Loss* (London, UK: Routledge, 1999) at 178.

of unreality associated with the physical shock of death;[9] both mental and physical exhaustion as a result of personal efforts to cope with the loss;[10] and the inability and unwillingness to function as an informed participant in market transactions.[11] This interference from the side effects of grief is a further reason to clarify what the PR's job entails.

B. Challenges to Reform

[6] Additional challenges to reform stem from the historical development of the law in this area. First, court involvement in estate administration was confusingly divided across the ecclesiastical courts, the chancery court and the probate court. Historically, a probate court determined what was the last will and testament of the deceased and who should administer the estate, but it was left to a chancery court to determine the meaning and interpretation of testamentary documents. Even in Alberta, where the superior court holds all of the powers exercised by the previously separate courts in England, there may still be some doubt as to whether there has been a clear amalgamation of all of the functions.[12]

[7] Second, the historical role of the courts in Alberta meant that the detailed procedural aspects of estate administration were contained in court rules. For some time, estate administration issues were dealt with as a separate part of the jurisdiction of the District Court, and then transferred to a separate court entitled the Surrogate Court, which was eventually merged with the Court of Queen's Bench.[13] As the *Surrogate Rules* are primarily procedural and have limited scope for substantive effect, the result was an awkward legislative regime.[14] When the Act was

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[9] Catherine M Sanders, *Grief. The Mourning After: Dealing with Adult Bereavement*, 2d ed (New York: John Wiley & Sons, 1999) at 50.

[10] John Archer, *The Nature of Grief: The Evolution and Psychology of Reactions to Loss* (London, UK: Routledge, 1999) at 105.

[11] James W Gentry et al, "The Vulnerability of Those Grieving the Death of a Loved One: Implications for Public Policy" (1995) 14:1 Journal of Public Policy & Marketing 128 at 129.

[12] *Judicature Act*, RSA 2000, c J-2, s 5.

[13] *Court of Queen's Bench Act*, RSA 2000, c C-31, s 2(1.1).

[14] Alberta, *Surrogate Rules* [Rules]. Despite the merger of the Surrogate Court into the Court of Queen's Bench, the court rules dealing with estate matters are still referred to as the Rules.

finally adopted in 1969, it contained substantive provisions that could not be accommodated in the Rules. For example, the Act has a long list of specific powers that a PR might need to exercise in specific circumstances. The Act was also a convenient spot to locate additional specific responsibilities of the PR, such as the necessity to advertise for creditors and claimants.[15] While some substantive measures were covered in the Act, there were other more detailed matters of substance that were not included in the Act or the Rules. In a typical legislative scheme this level of detail, whether substantive or procedural, would have been dealt with in regulations under the Act. In the case of administration, however, the procedural Rules preceded any substantive legislation, Act or regulations. As a result, there are gaps in the legislative scheme.

C. 1995 Reform of Surrogate Rules

[8] In 1995 the landscape changed considerably with the introduction of new Rules, which involved a complete rewrite of the old procedure based on a very different philosophy. There were two hallmarks to the new system. First, there was a very significant change in the role of the court. The ongoing supervisory role was transformed into a front end review of the due diligence of the PR which would justify the grant of authority. Second, the ongoing role of the court was replaced with a monitoring role of the beneficiaries to whom the estate would be distributed. Notice to those beneficiaries so that they could play such a monitoring role became a key component of the court's front end review. This new process, while significantly different and improved, may have had marginal impact on the administration of estates for which no formal court approval was sought.

[9] While no longer a court supervised process from beginning to end, the front end requirements are nevertheless significant. In fact, the content of an application for a grant of authority includes all the necessary information to allow the court to be satisfied that the administration will be carried out properly. The application must contain details of the will and the applicant for authority, an inventory of the estate assets, a listing

[15] Act, s 37.

of the beneficiaries, a plan of distribution, and all the required notices to beneficiaries, including those under other statutes such as the *Wills and Succession Act* and the *Matrimonial Property Act*.[16]

[10] One major development in the change in procedure was the addition of a task list in Schedule 1 of the Rules for PRs and lawyers acting in estate matters. This was the first iteration in any Alberta legislation of the job of a PR. The Rules' intent was to establish the Rules as a comprehensive manual for estate administration. To some extent, this manual superseded or at least paralleled many of the provisions of the Act. However, many of the concepts and philosophies that would normally have appeared in the Act were merely implicit in the Rules. The underpinnings of the system, the role of the players involved and the objectives of the process were not found in the Rules or the Act, but instead in background materials, continuing legal education materials and other secondary sources. This highlights the difficulty in trying to create a complete legislative scheme. While procedure can be documented in Rules, the authority and rationale for many substantive requirements is easily overlooked. Further, now some 16 years after they were revised, the Rules are also showing signs of age and there is some scope for their rationalization and modernization as well.

D. Scope of Changes Proposed in this Report

[11] This report proposes key changes to estate administration in Alberta.

- First, it proposes that a PR, whether appointed by a will or on intestacy, have the authority to act from death.
- Second, it proposes to set out clearly the values that the PR must follow in administering an estate. The PR must act with a duty of care, administer the estate in a timely manner and maintain communication.

[16] *Wills and Succession Act*, SA 2010, c W-12.2 [WSA]; *Matrimonial Property Act*, RSA 2000, c M-8.

- Third, it proposes to outline a clear and rational statement explaining the process of estate administration and the PR's core tasks. The starting point for this statement will be the current list of the PR's core tasks in the *Surrogate Rules*.
- Finally, it stresses the importance of communication by the PR to the beneficiaries, creditors and others. Communication arises in all aspects of the PR's job. The process of administering an estate is made easier for the PR and all involved if communication is open and effective.

E. Document Plan

[12] Chapter 2 looks at the PR's authority to act from death. Chapter 3 suggests values that PR must follow in administering the estate. Chapter 4 outlines the core tasks of a PR. Chapter 5 reviews communication between the PR, beneficiaries and others. Chapter 6 considers specific issues arising with respect to banks and other financial institutions.

CHAPTER 2

A PR's Authority to Act from Death

ISSUE 1

Should an administrator have authority to act from the time of death?

A. Introduction

[13] The law has traditionally distinguished between two types of PR — executors and administrators. An *executor* is a person appointed by the deceased by will to administer the deceased's estate. An *administrator* is a person appointed by the court to administer an estate where there is no will or, for some reason, no executor who is willing and able to act. An application to the court for a formal grant of authority is needed to allow an administrator to complete even the preliminary tasks associated with an estate. A grant of authority (i.e. a grant of administration) empowers the administrator to deal with the deceased's property, in the manner considered appropriate by the court and otherwise according to the law.

[14] In contrast, when a person appoints an executor by will, the executor is able to act from the time of the testator's death. The executor's authority comes from the will rather than from the court and so the executor may start to act without first obtaining a grant of authority from the court. Thus, in many circumstances, it will be easier for the executor than for the administrator to complete the preliminary work of administering the estate.

[15] A longstanding goal of reform in estate administration has been to remove unnecessary distinctions between the roles of executors and administrators. Both should have the same authority to administer the estate as both have the same tasks. This chapter considers whether it would now be appropriate to remove one of the last remaining distinctions between the roles and to give an administrator the authority to act from the time of death, regardless of whether the deceased died with a will or intestate.

B. Who May Apply to Administer the Estate?

[16] At present, the list of individuals eligible to apply to administer an estate is set out in the Rules. The list is a hierarchical one. Preference or priority among potential administrators is determined by their relative interest in the deceased's estate. Accordingly, if there is no will, the highest priority to apply goes to the person or persons entitled to the greatest share of the estate on intestacy as reflected in the following list:[17]

(a) the surviving spouse or surviving adult interdependent partner;

(b) a child of the deceased;

(c) a grandchild of the deceased;

(d) issue of the deceased other than a child or grandchild;

(e) a parent of the deceased;

(f) a brother or sister of the deceased;

(g) a child of the deceased's brother or sister if the child is an heir on intestacy

(h) next of kin of the deceased of closest and equal degree of consanguinity who are heirs on intestacy and who are not otherwise referred to in this subsection;

(i) a person who has an interest in the estate because of a relationship with the deceased;

(j) a claimant;

(k) the Crown.

In circumstances where there is a will but no acting executor, the list gives priority to beneficiaries according to their interest under the will:[18]

(b) a residuary beneficiary named in a will;

(c) a life tenant of the residue in a will;

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[17] Rules, r 11(2). The persons listed in paragraphs (a) to (h) reflect the scheme of intestate distribution set out in the WSA, Part 3.

[18] Rules, r 11(1).

(d) an heir on intestacy, excluding the Crown, if the residue is not completely disposed of in a will;

(e) a beneficiary receiving a specific gift in a will;

(f) a contingent beneficiary of the residue in a will;

(g) a contingent beneficiary of a specific gift in a will;

(h) the Crown in right of Alberta.

In both cases, the reason for the link between an interest in the estate and the ability to apply to administer it is that a person who stands to benefit from the estate has some motivation to take on its administration. As between applicants of equal priority, preference goes to an applicant living in Alberta.[19]

[17] Under the current law the person or persons with the highest priority may make an application to the court for a grant of authority to administer the estate. If more than one person has priority they may apply to act jointly or some of them may renounce their priority.[20] If necessary, the court may have to decide among multiple applicants. Similarly, a person with lower priority on the list may apply if the higher priority applicants renounce or the court allows the application.

C. Gap in an Administrator's Authority

1. WAITING PERIOD

[18] Section 3 of the Act provides that the court may not grant an application to administer an estate within 14 days of death. There is no clear policy reason for this requirement and similar waiting periods are not commonly imposed in other jurisdictions.[21] Moreover, the waiting period entrenches an administrator's gap in authority at the outset of the administration process.

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[19] Rules, r 11(3).

[20] Rules, r 32(2)-(3).

[21] Manitoba and New Brunswick are the only other provinces that impose a similar waiting period: Manitoba, *Court of Queen's Bench Rules*, r 74.04(4); *Probate Rules*, NB Reg 84-9, s 2.02.

[19] The application for a grant of authority itself demands considerable information about the estate assets – information that may be difficult to obtain without first having some authority. For example, banks and other third parties holding estate assets are often reluctant to disclose any information about the assets unless the person asking already has a grant of authority from the court. This catch-22 situation can be frustrating for potential administrators. While there are options for working around this problem, they may not be readily known to potential administrators. While banks are reluctant to release information, there is a greater reluctance to release any funds given the potential risk to the bank if the recipient does not have authority to act. One approach to address the initial gap with respect to authority to administer would be to provide that an administrator's authority is triggered at the time of the death.

2. VESTING

[20] In addition to the waiting period under the Act, there is also a common law problem regarding when property vests in an administrator. At common law, determining when property vests in an administrator depends on the nature of the property. The situation with respect to personal property (i.e. the deceased's goods and other non-land assets) is summarised by the Law Reform Commission of Nova Scotia:[22]

> ...If the deceased did not leave a will, personal property still vests in the administrator, but there is a problem in that the administrator does not get authority to act until appointed by the grant of administration. Obviously, the grant of administration is not obtained until after death. As a result, there is a gap between the date of death and the appointment of the administrator. The question arises as to who has title to the personal property during this period. There are two legal methods that may be used to fill this gap. By the first method, the personal property may be said to vest in the judge of the Probate Court or in some other government official and pass to the administrator when the grant is issued. British Columbia has specifically stated this in its

[22] Law Reform Commission of Nova Scotia, *Probate Reform in Nova Scotia*, Final Report 1999 at 56 [Nova Scotia Report] [footnotes omitted].

> legislation, in relation to personal property. The second method, the "doctrine of relation back", may be used to state that once the administrator is appointed, their title in the property is deemed to relate back to the date of death. For example, if the administrator disposed of property before the grant of administration was issued, the doctrine of relation back can be used to confirm the disposition of the personal property as valid, if it was done for the benefit of the estate. British Columbia appears to be the only province to have specifically inserted the doctrine of relation back in its legislation.

[21] In contrast, a different situation arises at common law with respect to real property such as land:[23]

> If the deceased did not leave a will, the real property passes immediately to the heirs, as determined by the *Intestate Succession Act*. The real property vests in the heirs until an administrator is appointed. As a result, the heirs have the right to deal with the property, including the right to sell it. If the administrator later finds that real property must be sold to pay estate debts, problems arise if the heirs have already sold it. As well, real property must be maintained. If the real property passes to the heirs, it may be difficult to determine who has responsibility for maintaining the property and paying any associated expenses.
>
> The common law problem of real property vesting in the heirs on intestacy has been corrected in many provinces. ... Real property therefore vests in the executor or administrator, in the same way that personal property vests at common law.

Alberta has passed legislation to prevent property vesting directly in the intestate beneficiaries.[24] While this change avoids the problem of property

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[23] Nova Scotia Report at 56-57.

[24] *Devolution of Real Property Act*, RSA 2000, D-12, s 2(1) provides that real property vests in the same manner as personal property.

> **Devolution of real property**
>
> **2(1)** Real property in which a deceased person was entitled to an interest not ceasing on the deceased's death

continued

passing directly to the beneficiaries, it does not address the problem of the initial gap in an administrator's authority.

[22] As noted in the Nova Scotia report, there are two common approaches to addressing the gap in an administrator's authority. One is the notion of relation back which deems the administrator to have had authority from the date of death. Relation back relies on a legal fiction and on retroactivity and as such is far from an ideal solution. The other approach is to allow the property to vest on a temporary basis in some other person or body that has authority.[25] While this approach avoids the problems of retroactivity and creating a legal fiction, the concept of having property vest in the court or other government entity is also problematic. This approach would be additionally problematic in Alberta as the current Act prevents an administrator from obtaining a grant of authority for the first 14 days after death. If the deceased's property were to vest in the court, would the court then be responsible for administering the estate for those 14 days? As neither relation back nor temporary vesting in some government entity are suitable responses we propose a different solution to address the gap in an administrator's authority.

D. Recommendations for Reform

[23] Rather than creating a legal artifice to bridge the gap between the death of the deceased and the administrator obtaining a grant of authority from the court, ALRI proposes to eliminate the gap by giving an administrator the authority to act from the time of death. Just as an executor is able to act immediately under the authority given by the deceased's will, an administrator would also be able to act from the time of death under authority conferred by legislation. The administrator would have the authority to act unless and until a court orders otherwise or the administrator renounces his or her authority. This result would

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(a) on the deceased's death, notwithstanding any testamentary disposition, devolves on and becomes vested in the deceased's personal representative as if it were personal property vesting in the personal representative, and

(b) shall be dealt with and distributed by the personal representative as personal estate.

[25] *Wills, Estates and Succession Act*, SBC 2009, c 13, s 102, (not yet in force) vests both real and personal property in the court pending the appointment of a personal representative other than an executor named in the deceased's will [WESA].

reverse the current situation which leaves the administrator without any authority until granted by the court. Most importantly it would give the administrator actual authority to take on the preliminary tasks required to administer the estate without first having to bring a court application. Regardless of whether the deceased died with a will or intestate, all PRs would have the same authority to begin the process of estate administration.

1. WHO WOULD HAVE AUTHORITY AS PR?

[24] In circumstances where there is no PR who is appointed or acting under a will, ALRI proposes that the person or persons with the highest priority on the hierarchical list of those eligible to administer the estate would have the authority as PR. To make this provision more accessible and to ensure that a PR properly acquires the substantive authority needed to administer the estate, the hierarchical list of prospective administrators should be moved from the Rules to the Act.

a. If there is no will

[25] If the deceased died without a will, his or her surviving spouse or adult interdependent partner would have authority as the PR from the time of the deceased's death. If the deceased died leaving no surviving spouse or adult independent partner, but adult children, the children would have joint authority as PR from the time of the deceased's death. This result is consistent with the current Rule. Accordingly, any decisions regarding the administration of the estate would have to be made jointly by the deceased's children or a majority of them subject to the requirement that gives preference to Alberta residents. In this regard, conferring authority as PR on persons with equal priority in the hierarchy is little different from a will that appoints multiple PRs.

b. If there is a will

[26] If the deceased died with a will but did not appoint a PR or the PR is unable or unwilling to act,[26] then the residuary beneficiaries would have joint authority as PR from the time of death. If there are no residuary

[26] Or the PR did not appoint a replacement if authorized to do so: Rules, r 11(1)(a.1).

beneficiaries, or the residuary beneficiaries renounce, then authority as PR would pass to the next class of beneficiaries on the hierarchy. In circumstances where there is an acting PR appointed by will but the PR ceases to act, a PR authorised by legislation would have authority from the time the former PR ceased to act.

c. Multiple PRs

[27] The potential for multiple PRs does present a difficulty. However, there are a number of avenues to address this. Individuals could renounce their authority in favour of a smaller group or a single PR. Further, if appropriate, a court application could be made to terminate the authority of one or more PRs at the same level. Similarly, renouncing authority or a court application are options for moving authority as PR to someone at a lower level in the hierarchy if doing so is in the interests of the estate. While the Rules currently limit the number of PRs to three, ALRI sees no reason to limit the number of PRs at the outset. The court currently has the discretion to authorise more than three PRs and there is no inherent guarantee that estate administration will be more effective or lead to fewer disputes if the number of PRs is capped at three.[27] Given the duties imposed on a PR, it is anticipated that there is sufficient incentive for some persons at the same level to renounce their authority. It is also reasonable to expect that, in the majority of situations involving multiple PRs, the PRs as a group will arrive at a workable system without the need for court intervention.

2. WHAT IF PR DOES NOT ACT?

[28] There may be instances where a PR, although authorized to act from death, does not do so. Inaction may be due to the fact that the PR chooses not to act (but does not renounce), is indifferent as to acting, or does not know that he or she has authority to act as PR. Similar instances arise where the PR is appointed by will. Where a PR appointed by legislation does not act, the PR should be treated the same as an inactive PR who is appointed under a will. That is to say there is no obligation to act, and therefore there can be no liability for not acting. Inactivity will

[27] Rules, r 11(4).

normally be taken to mean disinterest, and another person may step in. While inaction may be problematic, that alone imposes no liability on the priority person.

3. SUMMARY

[29] In summary, ALRI recommends that, in the absence of a PR who is acting under a will, the person or persons at the highest level in the hierarchy of those eligible to administer would have authority as PR from the time of the deceased's death. This result would close the gap in authority to administer that currently results where there is no PR acting under a will. Accordingly, all PRs could begin estate administration without having to bring a court application to obtain authority. Regardless of whether the deceased died with a will or intestate, or whether a testator's appointed PR is unable or unwilling to act, in all cases there would be someone with authority to step in as PR. Further, as with any administration, the PR has the option to renounce his or her authority and, on application, the court could limit or end the PR's authority. However, aside from closing the initial gap in authority to administer, giving all PRs the authority to act from death will not bring about a significant change in probate practice. Those estates that involve land or where a party holding estate assets insists on a court grant of authority will still require a formal application to the court to confirm the PR's authority. The procedural difference under this recommendation is that such an application does not have to be made before any estate administration gets under way. Nevertheless, allowing the PR authority to act from death may allow some small estates without land to be administered without a court application.

CHAPTER 3

Values that Govern a PR's Actions

A. Introduction

[30] As someone trusted to deal with a deceased person's property, a PR does not have free reign to do whatever they like. A PR must exercise a duty of care, administer the estate in a timely manner and communicate with beneficiaries and other interested persons.

[31] However, it would appear that not all PRs are aware of or comprehend the importance of these values. First, there are a number of cases in which PRs have appropriated estate property for their own use, failed to account or keep an inventory, or paid themselves excessive management fees.[28] In these cases it would appear that the PR's fiduciary role is not well understood.

[32] Similarly, there is a general impression that PRs frequently fail to carry out their job in a diligent and timely manner. A survey of Alberta cases requesting a formal passing of accounts revealed a time span of administration from one to over twenty-six years with an average of approximately eight years and six months. However, this result has to be interpreted with caution as formal passing of accounts by the court is rare and may occur where there have been disputes between the PR and the beneficiaries, which may lengthen the time for administration.

[33] As well, commentators have noted the difficulties caused by absence of, or dysfunction in, communication.[29] These are recent examples of PRs being taken to task for delayed and poor communication.

[34] The question is whether including those values in the Act would further public awareness and set clear expectations for the conduct of a

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[28] See for example: *Roberge v Roberge Estate*, 2004 MBQB 151; *Loftus v Clarke Estate*, 2001 BCSC 1136; *Laird v Lyne Estate*, 2004 BCSC 39; *Re Lowe Estate*, 2002 BCSC 813; *McClellan v. Pearase*, 2005 MBQB 289; *Kesler v Podlowski*, 2005 ABQB 229; *Harrison v Zelezniak*, 2008 MBQB 8; *Cordeiro v Kulikowsky* [2003] OJ no 2668 (Sup Ct J).

[29] *Babchuk v Kutz*, 2007 ABQB 88; *Petrowski v Petrowski Estate*, 2009 ABQB 753; *Re Foote Estate*, 2010 ABQB 197; *McDougald Estate v Gooderham* (2005), 255 DLR (4th) 435 (Ont CA).

PR. To answer this question, each of the values will be considered in greater detail.

B. Duty of Care: The Fiduciary Nature of the PR's Role

ISSUE 2

Should the Act contain an express statement that the PR must exercise a duty of care?

1. THE FIDUCIARY NATURE OF THE PR'S ROLE

[35] A PR is a fiduciary.[30] A fiduciary must act for the benefit of others, must exercise powers diligently and may be personally liable for losses from the estate.[31] A fiduciary must not profit from the role, must act indifferently and can only delegate administrative functions.[32] A fiduciary must act in good faith:[33]

> The fiduciary's obligations have been defined in a number of ways by the courts and commentators but essentially it means the duty to account to another who is the person with the right of enjoyment over the property in question, for all that one does with the property and in the office of trustee. Nothing may be done which is not directed solely towards the best interests of the trust beneficiary or beneficiaries.

[36] The primary obligation of a fiduciary is a duty of loyalty.[34] To ensure loyalty, the law does not allow a fiduciary to use the position to his

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[30] The fiduciary nature of the role evolved from the supervision by the chancery court of the administration of estates while the court was developing the law of trusts. The court tended to apply the law of trusts to estate administration. Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (1991) at 14 [Ontario Report]; Donovan WM Waters, Lionel D Smith & Mark R Gillen, eds *Waters' Law of Trusts in Canada*, 3rd ed (Toronto: Thompson Carswell, 2005) at 31IA.3, online: WestLaw Canada [Waters].

[31] James MacKenzie, ed, *Feeney's Canadian Law of Wills*, 4th ed, looseleaf (Markham, Ont.: Butterworths Canada, 2000) at § 8.7 [Feeney].

[32] Waters, note 30, at 31IA.4.

[33] Waters, note 30, at 3.1.A. See also Karen A Platten, "Duties of Trustees, Executives and Attorneys" in *44th Annual Refresher Course: Wills & Estates* (Edmonton: Legal Education Society of Alberta, 2011) at 6.

[34] Maurice C Cullity, "Executors" in Institute of Continuing Legal Education, *Are You Now or Have You Ever Been a Fiduciary?* (Ontario: Canadian Bar Association, 1994) at 25; Nancy L Golding,

continued

or her advantage.[35] There are differing views in the academic literature and the case law about who is a fiduciary, when the obligation arises, and the scope of the obligation.[36] The traditional view of fiduciary obligations is that they only operate negatively, in the duty to avoid conflicts of interest and the duty to not make unauthorized profits.[37] Under an alternative view, a fiduciary may be subject to positive obligations.[38] The nature of these positive obligations is evolving.[39]

[37] Currently, the Act does not expressly recognize a PR's role as a fiduciary or the duty of care to be followed. However, the nature of the role is hinted at in the Rules. For example, on an application for a grant, the applicant swears an affidavit that:

> The applicant(s) will faithfully administer the estate of the deceased according to law and will give a true accounting of their administration to the persons entitled to it when lawfully required.

[38] The final report of the Western Canada Law Reform Agencies on enduring powers of attorney discussed the fiduciary nature of an attorney's role. The report recommended that the duty to act as a fiduciary be included in legislation. The report proposed that plain language be used to describe this duty.[40]

"Roles, Responsibilities and Wrist-Slapping: The Personal Representative in Estate Litigation" in *44th Annual Refresher Course: Wills & Estates* (Edmonton: Legal Education Society of Alberta, 2011) at 3.

[35] Robert Flannigan, "The Boundaries of Fiduciary Accountability" [2004] 83 Can Bar Rev 35 at 37.

[36] Some examples of the literature outlining the confused state of the law: Robert Flannigan, "The Core Nature of Fiduciary Accountability" [2009] NZL Rev 375-429; Deborah A DeMott, "Fiduciary Obligation under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal" (1992) 30 Osgoode Hall LJ 471-497; Ernest J Weinrib, "The Fiduciary Obligation" (1975) 25 UTLJ 1-22; Leonard I Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding," (1995-1996) 34 Alta L Rev 821; PD Finn, "The Fiduciary Principle" in TG Youdan, ed, *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1.

[37] Robert Flannigan, "The Boundaries of Fiduciary Accountability" [2004] 83 Can Bar Rev 35 at 47.

[38] RP Austin, "Moulding the Content of Fiduciary Duties" in AJ Oakley, ed, *Trends in Contemporary Trust Law* (Oxford: Clarendon Press, 1996) 153 at 163.

[39] See for example the discussion below on the obligation of a fiduciary to communicate.

[40] Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Final Report (2008) at 27-28.

[39] In many cases, PRs are beneficiaries of the estate they are administering. There may be situations in which the PR's interests will conflict with that of the other beneficiaries. In such a case, the PR must recognize their fiduciary role and act fairly and in the best interests of all the beneficiaries.

[40] For example, a mother's will appoints her daughter as PR. The will gives a pearl necklace to the mother's other daughter. The PR remembers her mother telling her that she wanted the PR to have the necklace. How would the PR resolve these seemingly conflicting instructions? As a fiduciary, the PR must act honestly and disinterestedly and in the interests of all beneficiaries. She must follow the directions in the will and give the necklace to her sister.

[41] A further example is the situation where land (not the subject of a specific devise) is owned by the estate. The PR is a residuary beneficiary along with another family member. The PR wants to sell the land but the other family member objects. This would not put the PR in a conflict as long as it was in the best interests of both beneficiaries that the land be sold and the PR had informed the other beneficiary of the reasons for the decision.

[42] In a final example, the PR is a beneficiary under the will along with other family members. The PR decides that before the deceased's house can be sold, it should have a new roof. The PR employs his brother-in-law to do the job. The other beneficiaries agree that the roof needs replacing but object to the brother-in-law being hired. The PR can avoid the conflict of interest completely by not hiring his brother-in-law. However, provided that the roof replacement is done at a reasonable price and at a reasonable standard of quality the PR has not prejudiced the other beneficiaries' interests merely by hiring his brother-in-law. In each case the PR must ensure that their personal interests do not predominate the interests of the estate or beneficiaries.

2. RECOMMENDATION FOR REFORM

[43] ALRI recommends that the Act include a provision that sets out a PR's duty of care, along the lines of:

> A personal representative must

(a) act honestly and in good faith

(b) act in accordance with the instructions of the deceased's will, if there is a valid will, and with a view to the best interests of the beneficiaries which may include the PR, and

(c) exercise the care, diligence and skill that a reasonable and prudent person would exercise in comparable circumstances.

C. Timely Administration

ISSUE 3

Should the Act contain an express statement that the PR must administer the estate in a timely manner?

1. COMMON LAW

[44] Under the common law, a PR, once acting, must collect the assets and administer an estate without "undue or unreasonable delay."[41] The PR is personally liable for any loss as a result of delay. While there is no hard and fast rule as to what amounts to delay, the courts apply the "executor's year." Under this concept, an estate should be reduced to possession, i.e. brought under the control and authority of the PR, within a year from the death of a testator in the case of a will or within one year from a grant of letters of administration. The idea was explained in the Alberta case of *Re Czaban Estate*:[42]

> The concept of the "Executor's Year" is a common law rule which allows the PR a one year period starting at the date of the testator's death to administer the estate and transfer the assets without any interest accruing to the beneficiaries. If the personal representative fails to realize any property within a year, the onus is on the personal representative to provide valid reasons for the delay [references omitted].

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[41] Feeney at § 8.17.

[42] *Re Czaban Estate*, 2005 ABQB 917 at para 21 [references omitted].

[45] In *Irwin v Robinson*, the tenet was applied to delay in administering an uncomplicated estate. The deceased had died five years earlier and the court stated:[43]

> This was not a large estate nor did the level of complexity increase the care and responsibility required of Irwin. The estate trustees should have been able to distribute the estate assets of this simple estate within the "executor's year". Instead, it took an inordinate amount of time for the estate trustees to administer this estate and the work has not yet been completed.

[46] The courts will award interest to be paid on legacies after the expiration of the "executor's year" where there has been an unreasonable delay.[44]

2. PROVINCIAL LEGISLATION

[47] In Alberta, there is no provision which speaks to delay on the part of a PR. In some Canadian provinces, legislation requires the passing of accounts within a certain period of time which effectively imposes a time limit on administration. For example, in Saskatchewan the PR is required to "render a just and full account of the executorship or administration within two years after the grant of letters probate or letters of administration."[45]

3. OTHER JURISDICTIONS

[48] The executor's year remains in place in the United Kingdom under statute; the *Administration of Estates Act, 1925* provides that a PR cannot be required to distribute before the end of the year.[46]

[49] Several Australian states have enacted provisions which maintain the concept of the executor's year under statute.[47] In addition, the

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[43] *Irwin v Robinson*, [2007] OJ No 3831 (Sup Ct J) at para 58.

[44] Feeney at § 8.18.

[45] *The Administration of Estates Act*, SS 1998, c A-4.1, s 35(1). See also: *Judicature Act*, RSNL 1990, c J-4, Part VI, s 129 [Newfoundland Act]; *Probate Court Practice, Procedure and Forms Regulations*, NS Reg 119/2001, ss 53-54 [Nova Scotia Regs].

[46] *Administration of Estates Act, 1925* (UK), 15 & 16 Geo V, c 23, s 44 [UK Act].

Queensland *Succession Act 1981* requires that a PR is under a duty to distribute an estate "subject to the administration thereof, as soon as may be."[48]

[50] The National Committee for Uniform Succession Laws in Australia [Australian National Committee] has recommended that the provision on the duties of a PR include a provision that the PR has the duty "to distribute the deceased person's estate, subject to its administration, as soon as practicable."[49]

[51] The Uniform Probate Code in the United States requires that an estate should be settled and distributed "as expeditiously ... as is consistent with the best interests of the estate."[50] An additional section specifies that a PR must "proceed expeditiously with the settlement and distribution" of the estate.[51]

4. RECOMMENDATIONS FOR REFORM

[52] ALRI recommends the inclusion of a provision requiring a PR to carry out the administration in a timely manner. Such a statement would be consistent with the common law. There are precedents in the United Kingdom, the United States, Queensland and recent law reform recommendations in Australia. The section would serve to stress the importance of timely estate administration. We recommend that the PR could be required to distribute the estate "as soon as practicable."

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[47] There are provisions in Queensland, Victoria and Tasmania. National Committee for Uniform Succession Laws, *Administration of the Estates of Deceased Persons*, Discussion Paper, Queensland Law Reform Commission Miscellaneous Paper 37 (1999) at 69 [Australia Uniform Discussion Paper] (also published as New South Wales Law Reform Commission, *Uniform Succession Laws, Administration of estates of deceased persons*, Discussion Paper 42 (1999) at 99).

[48] *Succession Act 1981* (Qld), s 52 [Queensland Act].

[49] Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009) vol 4, at Administration of Estates Bill 2009, s 401 [Queensland Report].

[50] Uniform Probate Code § 3-703 (2006) [UPC].

[51] UPC § 3-704.

D. Communication

ISSUE 4

Should the Act contain an express statement that the PR must communicate openly with beneficiaries and other interested parties?

1. COMMUNICATION ACTIVITIES

[53] The importance of communication in estate administration is best viewed by considering a number of typical activities:

- Can the PR effectively carry out their job without communicating their authority to act and the basis of their authority as being named in a will or being the highest priority person?
- In gathering the estate, can the PR effectively administer without communicating with asset holders? A PR must communicate who they are, their authority and why they are seeking the property.
- Can the PR effectively administer without communicating with potential creditors regarding the death of the deceased and their necessity to evidence their claim, so that they can be paid?
- Can the PR effectively administer without communicating with beneficiaries, at least periodically, about the management of the estate assets? For example, if a house is to be sold as part of the management of the estate, are any repairs necessary; how will the house be listed; how is the listing price to be set; do family members have a preferential right to purchase; has the will provided any instructions to the PR?

[54] None of these activities can be carried out in isolation or silence. Even if we maintained the old system of court supervision, that alone would not guarantee a flow of relevant information to necessary parties. For these reasons, it is imperative to articulate as a value the need to communicate with relevant persons regarding the progress of the PR's

activity. Further, it must be direct reporting, rather than indirect reporting to a third-party supervisor.

2. RECOMMENDATIONS FOR REFORM

[55] Accordingly, ALRI recommends that the duty to communicate be expressly included in the Act and the crucial nature of this duty will be further developed in Chapter 5.

CHAPTER 4

The PR's Role

A. Introduction

[56] The PR must carry out a number of tasks to administer the estate and distribute the estate to the beneficiaries. A recent survey of Alberta lawyers indicated that the PR's responsibilities are not clear in the existing legislation and that this situation should be improved.[52] This chapter considers how the role of the PR can be clarified and made understandable. In particular, it considers whether the PR's task list should be moved from the rules to the Act and whether any additional tasks should be included on the statutory list.

B. Outlining the Core Tasks in the Act

ISSUE 5

Should the PR's core tasks be outlined in the Act?

[57] The responsibilities of the PR have developed over time through the courts. The tasks of the PR can be detailed in various ways. For example, Feeney provides the following list.[53]

1. dispose of the deceased's body;
2. schedule all the deceased's assets and ascertain their value;
3. arrange to have application made to the court of probate for the issue of proper grant of administration;
4. complete and file the required succession duty forms, if applicable;
5. advertise for creditors;

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[52] ALRI counsel notes, "CBA, Wills, Estates and Trusts" (North Section Meeting at Edmonton, 14 December 2010) [unpublished].

[53] Feeney at § 8.13.

6. complete and file income tax returns;
7. pay funeral, legal and testamentary expenses and succession duties and income taxes, if any, as well as pay all outstanding debts and meet all uncompleted obligations of the deceased;
8. claim all debts due to the deceased and generally collect all the assets;
9. keep accounts; and
10. invest assets not properly invested and not required for the immediate purpose of administration.

Iterations of the PR's role vary, but in broad terms, the PR must collect the estate, administer the property, pay the debts and distribute the property of the deceased.[54]

[58] As noted earlier, one of the advances in the 1995 reform of the Rules was to include a task list to outline the PR's role. In acknowledgment of the difficulties of including a substantive task list within the procedural content of the Rules themselves, the task list was included in a Schedule to the Rules and set out tasks for which the PR would be compensated. This chapter considers whether the PR's task list should now be moved to the Act and whether additional tasks should be included on the statutory list.

1. OTHER JURISDICTIONS

[59] At present, no Canadian province has an estate administration act in force which outlines the general duties of a PR.[55] Three Canadian law reform agencies have issued reports on the reform of estate administration. In 1991, the Ontario Law Reform Commission recommended that:[56]

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[54] New South Wales Law Reform Commission, *Uniform succession laws: Administration of estates of deceased persons*, Report 124 (2009) at 139 [New South Wales Report].

[55] Act; *Estate Administration Act*, RSBC 1996, c 122; *Court of Queen's Bench Surrogate Practice Act*, CCSM, c C290 [Manitoba Act]; *Probate Court Act*, SNB 1982, c P-17.1; Newfoundland Act; *Probate Act*, SNS 2000, c 31 [Nova Scotia Act]; *Estates Act*, RSO 1990, c E.21, *Estates Administration Act*, RSO 1990, c E.22 and *Trustee Act*, RSO 1990, c T.23; *Probate Act*, RSPEI 1988, c P-21; *The Administration of Estates Act*, SS 1998, c A-4.1.

[56] Ontario Report at 287-288.

> 6. The estate trustee should hold the deceased's estate upon the following trusts:
>
> (a) to exercise the powers conferred on her by law and by the will;
>
> (b) to carry out the obligations imposed on her by law and by the will;
>
> (c) to get in the estate of the deceased;
>
> (d) to pay the debts of the deceased in accordance with the obligations imposed on her by the law and by the will; and
>
> (e) to distribute the estate of the deceased in accordance with the law and the will.

[60] The 1999 report by the Law Reform Commission of Nova Scotia did not discuss whether there should be a general provision outlining the duties of PRs.[57] Similarly, the 2006 report by the British Columbia Law Institute does not mention the issue.[58] However, though not yet in force, WESA contains a provision on the general duties of the PR.[59] Section 142(2) directs a PR to administer and distribute an estate, to provide an accounting, and to perform any other duties under the will or the law.

[61] In 1970, the English Law Commission recommended that the primary duties of PRs should be clearly stated in legislation. The Commission reasoned that such a provision would "make for simplicity and aid understanding."[60] As a result, the UK Act was amended in 1971.[61]

[62] Law reform agencies in Australia have made similar recommendations on a number of occasions.[62] In 1999, the Australian

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[57] Nova Scotia Report. See also: Law Reform Commission of Nova Scotia, "Probate Reform in Nova Scotia" (1998-1999) 18 Estates, Trusts & Pensions Journal 53–92.

[58] British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report 45 (2006) [British Columbia Succession Report].

[59] WESA, s 142(2).

[60] The Law Commission (England), *Administration Bonds, PRs' Rights of Retainer and Preference and Related Matters*, Report 31 (1970) at para 11.

[61] UK Act, s 25.

[62] Queensland Law Reform Commission, *The Law Relating to Succession*, Report 22 (1978) at 36; Australia Uniform Discussion Paper, note 47, at 68.

National Committee stated that a general provision on the duties of PRs would serve as a warning, but would not take away from other duties under the common law.[63] Most recently in 2009, the Committee recommended that estate administration legislation should contain a statement of the core duties of PRs. Such a provision stresses the significance of the various duties and informs the general public.[64] The New South Wales Law Reform Commission concurs with the utility of such a provision in outlining the general duties of PRs for the lay public. [65]

[63] The Australian states of Queensland and Western Australia have provisions on the duties of legal representatives in their estate administration legislation. The provision in the Western Australian legislation is modeled on the UK Act.[66]

[64] In the United States, the Uniform Probate Code contains extensive provisions on the duties and responsibilities of PRs. The general duties of a PR are expressed as follows:[67]

> A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred on him by this Code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

There is also a detailed list of the duties of a PR which is similar to the list contained in the Rules.[68] The commentary on the section states that it is beneficial to ensure that PRs have the necessary powers for the careful handling of the estate.[69]

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[63] Australia Uniform Discussion Paper, note 47, at 68.

[64] Queensland Report, vol 1, at para 11.19.

[65] New South Wales Report at 139.

[66] *Administration Act 1903* (WA), s 43(1).

[67] UPC § 3-703.

[68] UPC § 3-715.

[69] UPC § 3-715.

2. RECOMMENDATION FOR REFORM

[65] ALRI recommends that the PR's task list, currently set out in a schedule to the Rules, should be moved to the Act. The PR's job is a complex one and should not be further complicated by maintaining the task list at the end of the Rules. As the task list currently covers several substantive points or confers authority on the PR, it should be moved to the Act.

[66] The Rules task list provides an overview of the PR's role. It was not intended to be an exhaustive description of the PR's role nor could it ever aspire to be within the procedural confines of the Rules. Moreover, given the variations among individual estates it would be impossible to craft a statutory task list that would cover all eventualities. Rather, the aim is to provide enough detail so as to assist the PR in understanding the main tasks to be done while providing sufficient flexibility to encourage and authorise the PR to act to address individual estate matters. Nevertheless, the Rules task list is an appropriate starting point for a statutory list.

[67] The Rules task list contains some twenty items. They are arranged in chronological order although it is not the order that all PR's would follow. It is proposed that the task list would provide greater guidance to the PR if it were arranged thematically rather than chronologically. The table below gives an example of how the task list would appear in a thematic arrangement.

[68] A thematic arrangement would also provide flexibility to add to the task list as circumstance change. For example, what, if anything, should the PR do about any online assets that the deceased may have had such as websites, blogs or social media space? While there are suggestions that the PR should take control in these areas, this is still an emerging issue.

[69] Further, there will inevitably be provisions in the Rules that should be included in the PR's task list. The following sections identify a few such obvious instances. It is anticipated that additional provisions in the Rules will be identified as better suited to being located in the Act when ALRI undertakes its review of the Rules.

Current Surrogate Rules Personal Representative's Tasks	Proposal for New Act Personal Representatives Tasks
1. Making arrangements for the disposition of the body and for funeral, memorial or other similar services. **2.** Determining the names and addresses of those beneficially entitled to the estate property and notifying them of their interests. **3.** Arranging with a bank, trust company or other financial institution for a list of the contents of a safety deposit box. **4.** Determining the full nature and value of property and debts of the deceased as at the date of death and compiling a list, including the value of all land and buildings and a summary of outstanding mortgages, leases and other encumbrances. **5.** Examining existing insurance policies, advising insurance companies of the death and placing additional insurance, if necessary. **6.** Protecting or securing the safety of any estate property. **7.** Providing for the protection and supervision of vacant land and buildings. **8.** Arranging for the proper management of the estate property, including continuing business operations, taking control of property and selling property. **9.** Retaining a lawyer to advise on the administration of the estate, to apply for a grant from the court or to bring any matter before the court. **10.** Applying for any pensions, annuities, death benefits, life insurance or other benefits payable to the estate. **11.** Advising any joint tenancy beneficiaries of the death of the deceased. **12.** Advising any designated beneficiaries of their interests under	**Collect the estate, including** • Arranging with a bank, trust company or other financial institution for a list of the contents of a safety deposit box. (3) • Determining the full nature and value of property and debts of the deceased as at the date of death and compiling a list, including the value of all land and buildings and a summary of outstanding mortgages, leases and other encumbrances. (4) • Applying for any pensions, annuities, death benefits, life insurance or other benefits payable to the estate. (10) **Administer the estate, including** • Examining existing insurance policies, advising insurance companies of the death and placing additional insurance, if necessary. (5) • Protecting or securing the safety of any estate property. (6) • Providing for the protection and supervision of vacant land and buildings. (7) • Arranging for the proper management of the estate property, including continuing business operations, taking control of property and selling property. (8) • Retaining a lawyer to advise on the administration of the estate, to apply for a grant from the court or to bring any matter before the court. (9) • Instructing a lawyer in any litigation. (17) **Paying the debts, including** • Arranging for the payment of debts and expenses owed by the deceased and the estate. (13)

Current Surrogate Rules Personal Representative's Tasks	Proposal for New Act Personal Representatives Tasks
life insurance or other property passing outside the will. **13.** Arranging for the payment of debts and expenses owed by the deceased and the estate. **14.** Determining whether to advertise for claimants, checking all claims and making payments as funds become available. **15.** Taking the steps necessary to finalize the amount payable if the legitimacy or amount of a debt is in issue. **16.** Determining the income tax or other tax liability of the deceased and of the estate, filing the necessary returns, paying any tax owing and obtaining income tax or other tax clearance certificates before distributing the estate property. **17.** Instructing a lawyer in any litigation. **18.** Administering any continuing testamentary trusts or trusts for minors. **19.** Preparing the legal representative's financial statements, a proposed compensation schedule and a proposed final distribution schedule. **20.** Distributing the estate property in accordance with the will or intestate succession provisions.	• Determining whether to advertise for claimants, checking all claims and making payments as funds become available. (14) • Taking the steps necessary to finalize the amount payable if the legitimacy or amount of a debt is in issue. (15) • Determining the income tax or other tax liability of the deceased and of the estate, filing the necessary returns, paying any tax owing and obtaining income tax or other tax clearance certificates before distributing the estate property.(16) **Distribute the estate to the beneficiaries, including** • Determining the names and addresses of those beneficially entitled to the estate property and notifying them of their interests. (2) • Advising any joint tenancy beneficiaries of the death of the deceased. (11) • Advising any designated beneficiaries of their interests under life insurance or other property passing outside the will. (12) • Administering any continuing testamentary trusts or trusts for minors.(18) • Preparing the legal representative's financial statements, a proposed compensation schedule and a proposed final distribution schedule. (19) • Distributing the estate property in accordance with the will or intestate succession provisions. (20)

C. Preparing an Inventory

ISSUE 6

Should preparing an inventory of the deceased's property be included as a core task?

[70] Collecting the estate involves ascertaining the assets and liabilities of the deceased and potentially compiling a detailed list of the same. While it is clear that collection of the assets is a core duty of the PR, whether completion of this duty necessitates the preparation of an inventory is not as clear as it could be in the Rules task list.

[71] In Alberta, when an application for formal authority is made, an inventory of the estate is filed with the court.[70] In the past, the practice was to submit a very detailed inventory including a precise description and the value of each asset. At a recent meeting, however, the Surrogate Rules Committee clarified that all that is required is an estimate of the total dollar value under each asset heading in the required form (Form NC 7).

1. OTHER JURISDICTIONS

[72] The requirements with respect to inventories vary across Canada. Provinces with a requirement that an inventory be filed on a grant application include Manitoba, Newfoundland, Nova Scotia and Prince Edward Island.[71]

[73] Under the recently enacted legislation in British Columbia, an applicant for a grant of probate from a court is required to "make a diligent search and inquiry to find the property and liabilities of the deceased person" and to "disclose information as required under the Rules of Court concerning the property of the deceased person."[72] The

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[70] Rules, Form NC 7.

[71] Manitoba Act, s 24(1); Newfoundland Act; s 112; Nova Scotia Act, s 57(1); *Probate Act*, RSPEI 1988, c P-21, s 48.

[72] WESA, s 122.

proposed rules require an applicant to disclose the property within the estate, its value and any debts charged on a specific asset.[73]

[74] In some provinces, such as Ontario, an inventory as such is not submitted. Instead, the total value of the estate is required to enable the estate tax to be calculated.[74] However, in Ontario, it appears that the inherent jurisdiction of the court to require a detailed inventory has been preserved.[75]

[75] In 1999 an Australian law reform commission noted the following advantages to requiring a PR to prepare an estate inventory:[76]

- Knowing the value of the estate allows interested persons to determine whether they should apply for statutory relief,
- An inventory discourages the hiding of assets and promotes honesty,
- A comprehensive inventory (which includes foreign assets) can be informal and accurate, without requiring a detailed valuation of assets,
- An inventory can help identify estate assets in the future in the event of improper or incomplete administration, and
- An inventory provides the basis for the PRs accounting.

In Australia all states, except for Queensland, require that an inventory be filed with an application for a grant.[77] In Queensland, in common with the United Kingdom, the requirement to file an inventory only occurs when required by the court.[78]

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[73] British Columbia Law Institute, *Report on New Probate Rules*, Report 57 (2010) at subrule 39 [British Columbia Probate report].

[74] Derek Fazakas, *Wills and Estates*, 2d ed (Toronto: Emond Montgomery Publications, 2004) at 117. Another example is New Brunswick which requires a total valuation, *Probate Court Act*, SNB 1982, c P-17.1, s 56.

[75] Ontario Report at 44.

[76] New South Wales Law Reform Commission, *Uniform Succession Laws – Administration of estates of deceased persons*, Discussion Paper 42, (October, 1999) at paras 9.9 - 9.11.

[77] Queensland Report, vol 1, at para 11.21.

[78] Queensland Act, s 52.

2. RECOMMENDATION FOR REFORM

[76] ALRI recommends that preparing an inventory be included as a core task of collecting the estate. Whether the PR brings an application for a formal grant of authority or not, preparing an inventory is a critical early step that allows the PR to gauge the scope of his or her role.

D. Creating and Maintaining Records

ISSUE 7

Should creating and maintaining records be included as a core task?

[77] Under the common law, a PR is required to keep accounts and to allow inspection of the accounts upon request. The accounts must detail every transaction accurately and the accounts can be subjected to a close examination.[79] In *Sandford v Porter*, the court stated that "[t]he duty of a trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required...."[80]

[78] The case law is unclear about the precise details of what has to be provided to the beneficiary who asks to see the accounts. It is also unclear as to whether the executor or administrator has to provide the beneficiary with a copy of the accounts or only the opportunity to inspect the documents.[81] The position seems to be that the beneficiary who desires a copy of the accounts must pay for the copy to be made.[82]

[79] The ability of the courts to require executors or administrators to pass their accounts originated in a statute passed during the reign of Henry VIII. The statute seems to have required executors and administrators to routinely display inventories to the court as a part of their tasks. From the beginning of the 19th century, the practice was not to

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[79] Carmen S Thériault, ed, *Widdifield on Executors and Trustees*, 6th ed (Scarborough, Ont: Carswell, 2002) (WL Can) at 13.1[Widdifield].

[80] *Sandford v Porter*, [1889] OJ No 43 (CA) at para 21.

[81] Ontario Report at 43 [footnotes omitted].

[82] Ontario Report at 43 [footnotes omitted]; Widdifield at 13.3.

require an accounting unless a court application had been made or the executor or administrator chose to voluntarily pass the accounts.[83] In *Kenny v Jackson*, the court stated that it was prudent for the executor or administrator to voluntarily pass the accounts to protect against liability.[84] Any interested person was able to ask the court for an accounting. The appearance of an interest was sufficient.[85]

> Any person interested in an estate, e.g., a next-of-kin, as being entitled in distribution, or a legatee or a creditor, may call upon the administrator or executor who has become the legal personal representative of the deceased to exhibit an inventory of the estate and render an account of his administration thereof.[86]

[80] Section 45 of the Act provides that beneficiaries have the ability to obtain information by having the accounts passed on application to the court. This reflects the common law. The "persons interested in an estate" who may apply to have the accounts passed are defined in Rule 57 to include PRs, residuary beneficiaries, heirs on intestacy, unpaid creditors, and family relief applicants. In addition, Rules 55 and 58 allow an application to be made to the court on any contested matter by any interested person.

1. OTHER JURISDICTIONS

[81] With respect to accounts, an obligation to maintain accounts is found in the probate rules of some provinces.[87] In Newfoundland and Labrador, accounts must be filed in the registry within one year after the

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[83] Charles Howard Widdifield, *The Law and Practice Relating to the Passing of Executors' Accounts* (Toronto: Carswell Company, 1916) at 1.

[84] *Kenny v Jackson* (1827), 162 ER 523.

[85] JHG Sunnucks, *Williams and Mortimer on Executors, Administrators and Probate*, 18th ed (London: Stevens & Sons, 1970) at 65.

[86] Thomas Hutchinson Tristram, *Coote's common form practice and Tristram's contentious practice of the High Court of Justice in granting probates and administrations* (London: Butterworths, 1915) at 265 [footnotes omitted].

[87] Nova Scotia Regs, s 57 "(1) A PR of an estate shall keep accurate records of all property and debts of the estate and all activity in the estate. (2) The accounts of an estate shall include..."; Ontario, *Rules of Civil Procedure*, r 74.17: "Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include...."

issuing of a grant.[88] In some other provinces, accounts will only be filed if an application for a passing of accounts is made.[89]

[82] In its 1991 report, the Ontario Law Reform Commission recommended that a separate provision be included in legislation making the duty to maintain the necessary records express. The Commission was particularly concerned that an inventory be created and kept current.[90]

[83] The Australian National Committee has recently made a similar recommendation in the same circumstances. They reasoned that many PRs are laypeople and thus it is advantageous to ensure that they are under a duty to maintain documents.[91] The Committee recommended that documents be maintained for three years following completion of the administration.[92]

2. RECOMMENDATION FOR REFORM

[84] ALRI recommends that creating and maintaining records should be included as a core task of administering the estate. This task is already required through the common law requirement of accounting but should be made more transparent through inclusion in the Act.

E. Providing Financial Statements

ISSUE 8

Should providing financial statements be included as a core task?

[85] Rule 97 of the Rules provides that a PR must give financial statements, including a statement of assets and liabilities, to the beneficiaries. These financial statements must be given at regular intervals

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[88] Newfoundland Act, s 129; Nova Scotia has a similar provision with the alternative for the filing of releases, Nova Scotia Regs, ss 53-54.

[89] *Probate Rules*, NB Reg 84-9, s 3.08; Manitoba Act, s 44.

[90] Ontario Report at 292.

[91] In Queensland, the recommended legislation contains the duty to provide inventory and accounting in a separate provision, Queensland Report, vol 4, at *Administration of Estates Bill 2009*, s 402.

[92] Queensland Report, vol 1, at para 11.187.

of not less than two years after the date of death or after the last time financial statements were provided. Beneficiaries of specific gifts are only entitled to financial information in respect of the specific gift.

1. OTHER JURISDICTIONS

[86] The provision that periodic financial statements shall be given to beneficiaries is unique in Canada. For example, Ontario specifies that PRs must keep accounts, but does not provide for those accounts to be given to beneficiaries at regular intervals.[93] It is not found in the recent law reform recommendations for new probate rules made by the British Columbia Law Institute.[94] The recent law reform recommendations in Australia have not suggested provision of financial statements.[95]

2. RECOMMENDATION FOR REFORM

[87] ALRI recommends that the requirement to provide financial statements be continued in the new Act as a core task of administering the estate. The current time frame of two year intervals seems reasonable.

F. Advertising for Creditors and Claimants

1. MANDATORY OR DISCRETIONARY ADVERTISING

ISSUE 9

Should the PR be required to advertise for creditors or other claimants?

[88] In Alberta, the Rules task list requires that the PR determine "whether to advertise for claimants." It is not mandatory that a PR advertise for creditors and claimants, however, there are incentives to do so. Like Ontario, if a PR fails to identify a claim and distributes the estates, the PR will be personally liable to the claimants to the extent of the value

[93] Ontario, *Rules of Civil Procedure*, r 74.17.

[94] British Columbia Probate Report.

[95] Queensland Report, vol 1, at paras 6.45-6.47.

of the estate, whether or not the PR had notice of the claim.[96] This liability can be avoided by complying with section 37 of the Act, which provides:

> Distribution of estate
> **37(1)** On complying with the provisions of the Rules regarding advertising for creditors and claimants, the legal representative is entitled to distribute the property of the deceased person having regard only to the claims of which the legal representative has then notice and the legal representative is not liable to any person of whose claim the legal representative does not have notice at the time of the distribution of the property or part of it in respect of any such property so distributed.
>
> **(2)** Nothing in subsection (1) prejudices the right of a creditor or claimant to follow the property or any part of it into the hands of a person who has received it.

Similar protection is provided in sections 38(1)(h) and 38(2) of the *Trustee Act*, RSA 2000, c T-8.

[89] Rule 38 provides greater precision as to the form, content, placement and timing of the advertisement. If a PR decides to advertise for creditors or claimants they may use Form NC 34. Advertisements must be placed in newspapers where the deceased usually lived or if the deceased did not usually live in Alberta, in the area where a significant amount of the deceased's property is situated. The advertisement must be placed at least once or twice, depending on the value of the estate.[97] Creditors must make their claim within one month from the date of the last advertisement or seek prior consent of the court.[98]

a. Other jurisdictions

i. Ontario

[90] As in Alberta, advertising for creditors in Ontario is left to the discretion of the PR. There is, however, an incentive to do so as section 53

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[96] Ontario Report at 198.

[97] Where the gross value of the estate is $100,000 or less, then notice must be advertised once. If it is more than $100,000 then at least twice with 5 days or more between the publications. (While the dollar value may appear to be low, it appears that this rule was last reviewed in 2010.)

[98] Rules, r 39.

of Ontario's *Trustee Act* protects a PR from personal liability for claims of creditors if the PR has adequately advertised for creditors.[99] In the case of intestacy, if a PR wants to distribute the estate within one year of the death, the PR must advertise for creditors. The Ontario *Estates Administration Act*[100]provides that no distribution of an intestate's estate can be made until after the expiration of one year from the date of death, unless the PR has complied with section 53 of the *Trustee Act*.

[91] There is "no legislative guidance as to the form, content, placement or timing of the advertisement, the time limits to be specified for the notification of claims, or the warnings to be given to claimants."[101] These are matters that are dealt with as a matter of practice. In general, the practice is to advertise at least three times in the local newspaper where the deceased lived and to allow at least thirty days since the date of the last advertisement before the estate is distributed. In its 1991 Report the OLRC noted there was some divergence of opinion with respect to this practice and recommended these details be included in legislation. To date, however, it does not appear that these recommendations have been implemented.

II. British Columbia

[92] British Columbia has recently moved from a mandatory requirement of advertising for creditors and other claimants to one that is at the PR's discretion. Under the previous legislation, section 38 of the *Trustee Act* required advertisements to be published in successive weeks in a newspaper circulating where the deceased last resided in addition to a notice in the Gazette.[102] This approach was criticized as expensive and ineffective.[103] Accordingly, the British Columbia Succession Report recommended that a new provision should retain only a requirement to advertise once in the Gazette.[104] The report also urged changes to the accessibility of Part I of the Gazette in order to facilitate without

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[99] *Trustee Act*, RSO 1990, c T.23, s 53.

[100] *Estates Administration Act*, RSO 1990, c E.22, s 26.

[101] Ontario Report at 198.

[102] *Trustee Act*, RSBC 1996, c 464, s 38.

[103] British Columbia Succession Report at 207, 253.

[104] British Columbia Succession Report at 207.

subscription searches by the last name of the deceased.[105] It also recommended that the time for creditors to present claims should be extended from 21 to 30 days.[106] These recommendations are reflected in section 154 of the WESA.

iii. Nova Scotia

[93] Advertising for creditors is mandatory under the Nova Scotia Act. Section 63(1) provides:

> Before the payment of debts and expenses or distribution of an estate, the personal representative shall, by advertisement in the Royal Gazette for six months in such manner and at such times as is prescribed, call on all persons who have any demand upon the estate to file a claim within that six month period.

b. Is there a need for reform?

[94] As described above, advertising for creditors is currently left to the discretion of the PR in Alberta, although there are incentives in terms of reduced personal liability for completing this step. Across Canada, advertising for creditors is generally left to the discretion of the PR, although there continue to be some jurisdictions in Canada, including Nova Scotia and Prince Edward Island, where advertising for creditors is mandatory.

[95] One reason for a PR to advertise is to notify claimants that the debtor has died and to advise them of the person to contact with respect to their claims. Similarly, advertising for claimants enables the PR to identify actual and potential liabilities before distributing the estate; advertising also protects the PR from personal liability with respect to claims asserted after the estate has been distributed. This is of less significance where the PR is also the sole beneficiary of the estate, as a claimant may still advance a claim against the beneficiary.[107] However, where a creditor is not made

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[105] British Columbia Succession Report at 207, 253.

[106] British Columbia Succession Report at 253.

[107] Ontario Report at 199.

aware of the death before the estate is partially or fully distributed, the creditor still has the option to:

- make a claim against the remaining assets in the estate;
- sue the PR; or
- follow the asset and make a claim against the beneficiary.

[96] ALRI's conclusion is that advertising for creditors should continue to be left to the discretion of the PR. A provision similar to section 37 of the Act should be retained so that there is an incentive to advertise for creditors.

2. WHERE TO ADVERTISE

ISSUE 10

Where should the PR advertise for creditors?

[97] As described above, in Alberta notices to creditors are to be placed in newspapers where the deceased usually lived or if the deceased did not usually live in Alberta, in the area where a significant amount of the deceased's property is situated. Most Canadian jurisdictions where advertising for creditors is discretionary include a similar provision. In those jurisdictions where advertising for creditors is mandatory, advertising costs are reduced by requiring that the advertisement be in the provincial gazette rather than the local newspaper. [108]

[98] Interestingly, the approach in British Columbia is an exception to this general trend. As noted above, British Columbia has moved from a mandatory advertising scheme to one that is discretionary. At the same time, it has moved from requiring that advertising for claimants be in newspapers to requiring that the advertisement appear only once in the *British Columbia Gazette*.[109]

[99] The *Alberta Gazette* is published twice a month by the Queen's Printer. It is available in both an electronic and a hardcopy format and the

[108] Ontario Report at 201.

[109] British Columbia Succession Report at 207.

cost of a subscription is inexpensive. The advertising rates are also considerably less than those of local newspapers. [110]

[100] The principal argument in favour of advertising in newspapers is that they are considered to be more accessible to individual creditors or small businesses than the provincial gazette.[111] On the other hand, this form of advertising is more costly and time consuming for the PR.[112] There is also in general a decline in readership of print media; however, most newspapers and the provincial gazettes are responding with online versions.

[101] In recommending a move to the provincial gazette, BCLI noted that serial advertisements in newspapers are time consuming, expensive and no longer considered to be an effective means of notifying creditors.[113] They recommended a move towards only requiring a PR to advertise once in the provincial gazette, but coupled this recommendation with recommendations to improve the ability of creditors to search the gazette without a subscription.[114]

[102] The Ontario Law Reform Commission considered a procedure for providing public notice through the court clerk's office.[115] The proposal was to establish a register in the court clerk's office in which the clerk would record the relevant information concerning an estate. The onus would fall on the individual creditor to periodically search the register. In addition, the register index would be published periodically. The Ontario Law Reform Commission ultimately rejected this proposal as being costly and ineffective. They noted that such a proposal would only be relevant where an application had been made to the court for a grant of probate. [116]

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[110] A legal notice in the *Calgary Herald* newspaper costs approximately $3-10/line per day, depending on the style. In contrast, the *Alberta Gazette* charges $20 per month for a notice that is 5 or fewer pages.

[111] Ontario Report at 201.

[112] Ontario Report at 201.

[113] British Columbia Succession Report at 207, 253.

[114] British Columbia Succession Report at 207, 253.

[115] Ontario Report at 201.

[116] Ontario Report at 201.

[103] ALRI would be interested in views as to whether or not it would be more effective to advertise for creditors in the Alberta Gazette, rather than in local newspapers.

3. CREDITORS AND OTHER CLAIMANTS DEFINED

ISSUE 11

Should "claimant" be defined?

[104] A further consideration is who qualifies as "creditors and other claimants"? There is no definition of "claimant" in the Act, however, claimants are referenced in section 37(1). Rule 1(c) of the Rules provides that claimants includes creditors. Would claimants include statutory claimants for family maintenance and support or matrimonial property division? Others with a claim against the estate? What about beneficiaries?

a. Other jurisdictions

[105] The Ontario legislation does not define "claimants." In its 1991 Report, the OLRC recommended that claimant should be defined so as to include creditors:[117]

> [C]laimant should be defined to mean a person who has a claim against the estate of a deceased, whether arising prior, or subsequent, to the death of the deceased, or any other cause, whether the claim is contingent or not, liquidated or unliquidated, secured or unsecured, matured or unmatured.

[106] WESA takes a different approach. It defines "claimant" so as to exclude either a will or intestacy beneficiary. Section 154(1) provides:

> 154(1) In this section, "claimant" does not include a person who has commenced proceedings to determine whether he or she is a beneficiary or an intestate successor.

b. Recommendation for reform

[107] ALRI recommends that the Act should define "claimant" broadly so as to include all persons with a claim against the estate other than

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[117] Ontario Report at 197 [footnotes omitted].

beneficiaries. However, the definition should also exclude statutory dependants with a claim for matrimonial property division or under Part 5 of WSA which gives an independent right to information.

G. Disposing of the Body

ISSUE 12

Should disposing of the body be included as a core task?

[108] Disposing of the body is an important immediate task. It is listed as the first item on the Rules task list. Indeed, at common law, it is the executor's duty to take possession of the body and make funeral plans.[118] Where there is no executor, as on intestacy, the common law is not clear whether the next-of-kin have a duty to arrange the funeral.[119] This uncertainty has been resolved by legislation in Alberta.

1. WHO HAS AUTHORITY?

[109] In Alberta, there is legislation that outlines who has authority to dispose of the body. The *General Regulation (Funeral Services)* provides:[120]

> **36(2)** The right to control the disposition of human remains or cremated remains vests in and devolves on persons in the following order of priority:
>
> (a) the personal representative designated in the will of the deceased;
>
> (b) the spouse or adult interdependent partner of the deceased if the spouse or adult interdependent partner was living with the deceased at the time of death;
>
> (c) an adult child of the deceased;
>
> (d) a parent of the deceased;

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[118] Legal Education Society of Alberta, *Alberta Estate Administration* (2005) at 2-12; Widdifield at 1.1.

[119] John Ross Martyn & Nicolas Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, 19th ed (London: Sweet & Maxwell, 2008) at 6-01.

[120] *General Regulation (Funeral Services) Act*, Alta Reg 226/98, s 36(2)-36(4).

(e) a guardian of the deceased under the *Adult Guardianship and Trusteeship Act* or, if the deceased is a minor, under the *Child, Youth and Family Enhancement Act* or the *Family Law Act*;

(f) an adult grandchild of the deceased;

(g) an adult brother or sister of the deceased;

(h) an adult nephew or niece of the deceased;

(i) an adult next of kin of the deceased determined on the basis provided by sections 8 and 9 of the *Intestate Succession Act*;

(j) the Public Trustee;

(k) an adult person having some relationship with the deceased not based on blood ties or affinity;

(l) the Minister of Employment and Immigration.

(3) If, under subsection (2)(c) to (h), the right to control the disposition of human remains or cremated remains passes to persons of equal rank, in the absence of agreement between or among them, the order of priority begins with the eldest person in that rank and descends in order of age.

(4) If the person who, under this section, has the right to control the disposition of human remains or cremated remains is not available or is unwilling to give instructions, that right passes to the next available qualified person.

However, it does not appear that this regulation is well known. Uncertainty over who had authority to dispose of the body was a recurring theme in our consultations. Moreover, this legislation was overlooked in recent litigation regarding control of a body.[121]

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[121] In *Johnston v Alberta (Director of Vital Statistics)*, 2008 ABCA 188 the mother of an R.C.M.P. officer, who was slain while on duty, objected to having his body disinterred and moved to an R.C.M.P. cemetery as had been requested by his widow. The court held that the widow was the first in priority under a list in *The Cemeteries Act* and her priority prevailed. There was no mention that the widow also had higher priority than the mother to make the initial decision under the *General Regulation (Funeral Services)*.

2. IS REFORM NEEDED?

[110] Although poorly known, the current regulation outlines an appropriate list of persons with authority to dispose of a body. If the deceased opted to appoint a PR by will then the PR has the authority to dispose of the body. If no PR is appointed by will, authority falls to the deceased's family members in order of priority. This listing parallels the list of those who would have authority to administer the estate if there were no will. However, the regulation has the important distinction of giving authority to the oldest member of a class if the class members cannot agree; this recognises that there is a time sensitivity in disposing of a body and that one person must be authorised to make a decision if there is no agreement.

[111] While the list differs from those who would have authority to administer if there was a will but the will did not provide for a PR (i.e. administration with will annexed) there are good policy reasons not to match that list. While ALRI has recommended that a PR should have authority from death it does not follow that all PRs given such authority should dispose of the body. To match the list of authority to dispose of the body to persons with authority as PR outside of the will would produce inappropriate results in some cases. For example, if the deceased's will named the Local Community Foundation as a residuary beneficiary then the Foundation would likely have authority to act as PR if there were no other PR named in the will. However, it does not follow that the Foundation should be authorised to dispose of the body. To do so would not only be problematic for the Foundation but would also be insensitive to the grieving family and friends of the deceased. The current list of those with authority to dispose of the body reflects the close link between the deceased and the deceased's family that exists in the vast majority of cases.

[112] The PR may or may not have authority to dispose of the body by virtue of the funeral services legislation. Accordingly, ALRI does not recommend that disposal of the body should be included in the PR's task list in the new Act. However, it might assist PRs and the deceased's family members if the Act were to contain an appropriate cross-reference to the funeral services legislation. ALRI seeks views as to how the two areas of legislation might be better coordinated.

H. Summary

[113] In the course of this chapter, ALRI has recommended that the PR's task list currently stated in a schedule to the Rules should be moved to the Act. The list should be arranged thematically according to the main areas of collecting the estate, administering the estate, paying the debts and distributing the estate to the deceased's beneficiaries. ALRI has also recommended the inclusion of three additional items on the task list:

- preparing an inventory of the estate's property and liabilities,
- creating and maintaining records, and
- providing financial statements.

These tasks are essential to the proper and effective administration of an estate and are sound, common sense practices. Preparing an inventory and financial statements are already required where a PR applies for formal court authority. Adding the requirement to create and maintain records of how the deceased's property is dealt with will facilitate preparing the financial statement as required. Finally, ALRI has recommended that disposing of the body not be included in the PR's task list in the Act as this is appropriately dealt with in other legislation.

[114] Further, it would be helpful to draw the PR's attention to the fact that he or she will be subject to other duties imposed by common law or legislation. For example, the WSA requires a PR to provide notices to specific family members of the deceased regarding potential claims against the estate for maintenance and support.[122] Similarly, under the *Devolution of Real Property Act*, a PR must hold any real property of the estate as a trustee.[123] Accordingly we would also propose that the list of the PRs tasks should include a statement along the lines of "and any other duties required by law or under a valid will." This would alert PRs to the fact that their duties are not exhausted by the Act.

[115] As a result, the proposed task list for the PR would resemble the example shown in the table below.

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[122] WSA, s 91.

[123] *Devolution of Real Property Act*, RSA 2000, c D-12, s 3.

Proposal for New Act — Personal Representative Tasks
Collect the estate, including • Arranging with a bank, trust company or other financial institution for a list of the contents of a safety deposit box. (no change) • Determining the full nature and value of property and debts of the deceased as at the date of death and compiling a list, including the value of all land and buildings and a summary of outstanding mortgages, leases and other encumbrances. (no change) • Applying for any pensions, annuities, death benefits, life insurance or other benefits payable to the estate. (no change) • Preparing an inventory of the estate assets and liabilities. (**new**) **Administer the estate, including** • Creating and maintaining records. (**new**) • Examining existing insurance policies, advising insurance companies of the death and placing additional insurance, if necessary. (no change) • Protecting or securing the safety of any estate property. (no change) • Providing for the protection and supervision of vacant land and buildings. (no change) • Arranging for the proper management of the estate property, including continuing business operations, taking control of property and selling property. (no change) • Retaining a lawyer to advise on the administration of the estate, to apply for a grant from the court or to bring any matter before the court. (no change) • Instructing a lawyer in any litigation. (no change) • Providing financial statements. (**new**) • Any other duties required by law under a valid will. (**new**) **Paying the debts, including** • Arranging for the payment of debts and expenses owed by the deceased and the estate. (no change) • Determining whether to advertise for claimants, checking all claims and making payments as funds become available. (no change) • Taking the steps necessary to finalize the amount payable if the legitimacy or amount of a debt is in issue. (no change) • Determining the income tax or other tax liability of the deceased and of the estate, filing the necessary returns, paying any tax owing and obtaining income tax or other tax clearance certificates before distributing the estate property.(no change)

Proposal for New Act — Personal Representative Tasks
Distribute the estate to the beneficiaries, including • Determining the names and addresses of those beneficially entitled to the estate property and notifying them of their interests. (no change) • Advising any joint tenancy beneficiaries of the death of the deceased. (no change) • Advising any designated beneficiaries of their interests under life insurance or other property passing outside the will. (no change) • Administering any continuing testamentary trusts or trusts for minors.(no change) • Preparing the legal representative's financial statements, a proposed compensation schedule and a proposed final distribution schedule. (no change) • Distributing the estate property in accordance with the will or intestate succession provisions. (no change)

CHAPTER 5

Communication

A. Introduction

[116] As noted in Chapter 3, effective communication is key in administering an estate. The current Rules task list contains some communication tasks such as notifying beneficiaries of their interest in the estate. However, in moving the task list from the Rules to the Act, it is appropriate to give more attention to the PR's role in communication. It is also important to keep in mind the 1995 shift of estate administration from a court-monitored to a beneficiary-monitored process. In that context it is also appropriate to consider what information the PR needs to provide to beneficiaries so that they can monitor their interests. This chapter considers communication between the PR and beneficiaries as well as between the PR and other interested parties.

[117] The main features of the PR's current obligation to give notice in Alberta are that:

- Notices are given to will beneficiaries, or intestate beneficiaries in connection with a court application for formal authority;
- Notices are provided to some statutory claimants, depending on the particular legislation;
- Giving notice alerts the beneficiaries to the need to monitor their interests in the estate;
- The information contained in the notice varies depending on the recipient;

- The duty to give notice may be mandatory or optional, again depending on the recipient; and,
- There is no clear timeframe for giving notice.[124]

B. Notifying Beneficiaries

ISSUE 13

What information should the PR provide to beneficiaries of the deceased's estate?

1. CURRENT INFORMATION REQUIREMENTS

[118] Under the current law, as part of an application for formal authority, the information provided by the PR to a beneficiary depends on the type of beneficiary and is tailored to meet court requirements. Some notices contain basic information, some include complete information about the estate and administration details, and some fall in the middle with the PR providing basic information and partial estate administration information.

a. Basic information

[119] All beneficiaries receive basic information about the estate if an application for formal authority is made to the court. In particular the notices state the following:[125]

- identity of the deceased,
- name of the PR,
- that an application for formal authority has been made by the PR, and

[124] The time for giving notice is tied to the PR's court application for a grant of probate or administration in that the PR must provide copies of the notices given to various persons when making the application, see Rules, r 13(1).

[125] Rules, Schedule 3, Forms NC 19-24.1, 34.

- that the notice recipient may receive property gifted to them by the deceased or may otherwise have a claim against the estate assets.

b. Partial estate information – specific beneficiaries, others

[120] Persons to whom the deceased made specific gifts, (the specific or non-residuary beneficiaries) receive the basic information plus partial estate information concerning only the specific estate asset that the deceased gifted to the recipient.[126]

c. Complete estate information – residuary beneficiaries or beneficiaries on intestacy

[121] Residuary beneficiaries and beneficiaries on intestacy receive the basic information and a copy of the completed application for formal authority.[127] A review of the requirements for making an application and the mandatory content of related forms indicates that the following items are part of a complete application:[128]

- a copy of the will (if any),
- an inventory of estate assets and debts,
- information concerning the identity and address of each person beneficially interested in specific and other estate assets,
- the names and addresses of each person who may have a statutory claim (e.g. for family maintenance and support or matrimonial property division), and
- the time period for making statutory claims against the estate.

[122] The notice to a residuary beneficiary draws attention to the fact that the application includes a copy of the will and a list of estate property and

[126] Rules, Schedule 3, Form NC 20.

[127] Rules, Schedule 3, Forms NC 19, 21.

[128] Rules, r 13.

debts.[129] The notice to a beneficiary on intestacy also notes that a list of property and debts is part of the application.[130]

2. RECOMMENDATION FOR REFORM

[123] Beneficiaries cannot enforce their rights and monitor the administration of an estate unless they are aware that they are entitled to estate property. Moving the notice requirement from the Rules to the Act is a logical extension of the current requirements for notice to beneficiaries where a formal application is made. All beneficiaries need to know of their interests in the estate. Where the beneficiary's interest arises from the deceased's will, providing information about the beneficiary's interest also reflects and respects the deceased's wishes. Accordingly, ALRI recommends that, whether or not a PR applies for formal authority, the PR be required to notify all beneficiaries as to:

- the identity of the deceased,
- the name of the PR, and
- the nature of the gift left to them by the deceased's will or intestacy.

This information would be in addition to any notices given to beneficiaries who also have statutory claims for family maintenance and support or matrimonial property division.

[124] ALRI further recommends that in cases where there is no will, notices to intestate beneficiaries should include a reference to the specific provision of the WSA by which ownership of the deceased's property transfers to intestate beneficiaries.

[125] Finally, in all cases the notice should clearly state that all gifts are subject to the prior payment of the deceased's debts and other claims against the estate.

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[129] Rules, Schedule 3, Form NC 19.

[130] Rules, Schedule 3, Form NC 21.

C. Copy of the Will

ISSUE 14

Should all beneficiaries receive a copy of the will?

[126] In Alberta, only residuary beneficiaries receive a copy of the will. Further, this applies only if the PR seeks a formal grant of authority from the court and complies with the requirements under the Rules and related forms.

1. OTHER JURISDICTIONS

[127] In 1999 the Law Reform Commission of Nova Scotia recommended that "Wills should not be attached to any notice. The notice should instead refer to the location of the will and its availability for examination."[131]

[128] The proposed new British Columbia probate rules provide that a notice of application for formal authority must:[132]

- contain statements to the effect that the recipient has a right to oppose the application, may or may not have rights under named statutes and that the PR "must account to the beneficiaries or intestate successors of the deceased," and
- include a copy of the will, if any.

In discussing the requirement to provide a copy of the will to beneficiaries, the British Columbia Law Institute said:[133]

> The need for... this requirement... has been considered carefully. Privacy considerations have been weighed, as well as the utility of sending a complete copy of a will in all cases even if the financial interest of a particular notice recipient in the estate is very small. The decisive considerations in the decision to retain the requirement were that recipients who are eligible to make a claim for variation of the will under...

[131] Nova Scotia Report at 27.

[132] British Columbia Probate Report at subrules 9-10.

[133] British Columbia Probate Report at 45-46.

> the WESA [BC Act] would not be able to properly assess their position without seeing the entire will, and it may be the only means by which charities would be alerted to the fact they have been left a legacy, and to its size and nature.

2. REASONS TO PROVIDE THE WILL

[129] There are a number of reasons why the beneficiaries named in a will should get a copy of the will in addition to the basic information. As Lightman concluded, the old rule of keeping the terms of a gift under a will secret from the intended recipient unless the will said to disclose is likely to cause injustice, is of no benefit and needs to be reconsidered for modern times.[134]

[130] Lightman also describes the duty to disclose will provisions to a beneficiary as a fiduciary obligation and states that:[135]

> A ...testator having recourse to a ...Will to create a settlement must as part of the price for that privilege accept that beneficiaries need to be informed to monitor and enforce performance by the ...executors of their duties so far as they relate to them. If a ...testator chooses to create a large body of beneficiaries, he must expect wide dissemination of trust information.

[131] Beneficiaries need more than a bare description of their own gift to be able to properly monitor their interests and understand the impact that other testamentary claims on the estate may have on whether they receive all, some or none of what the deceased intended.[136]

[132] The current requirement that a PR interpret the will, together with completion of other detailed activities, in order to administer the estate

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[134] Gavin Lightman, "The Trusted Trustees' Duty to Provide Information to Beneficiaries," (Withers Trust Lecture delivered at Kings), (2004), 1 PCB, 23 at 34-36 with reference to HAJ Ford & WA Lee, *Principles of the Law of Trusts*, 2d ed (Sydney: Law Book Co. 2003) at 425 and *Scally v Southern Health and Social Services Board*, [1992] 1 AC 294.

[135] Gavin Lightman, "The Trusted Trustees' Duty to Provide Information to Beneficiaries," (Withers Trust Lecture delivered at Kings), (2004), 1 PCB, 23 at 40.

[136] This is particularly important in cases where there may not be enough assets in the estate to pay all the deceased's debts and or make all gifts contemplated under the will. See *Halsbury's Laws of Canada*, Wills and Estates (LexisNexis Canada, 2010) at HWE at 277, which describes the general order of abatement [Halsbury's].

puts a great deal of responsibility on the PR. Beneficiaries may want to interpret the terms of a gift directly and verify the accuracy of the PR's assessment. In order to do this, the beneficiary would need to see the terms of the gift in the context of the entire will.

[133] The following comment, obtained during the consultation process, relates to difficulties encountered by will beneficiaries that might be resolved if the PR was required to provide basic estate information and a copy of the will to each beneficiary named in the will:[137]

> I work for a charity. Because a charity is not a family member that automatically knows when a person has died, the charity may not know until far too late that they have an interest in an estate. Alternatively, it may be that a will is destroyed to disinherit a charity.

[134] The following point was raised by a lawyer during an estate administration reform discussion hosted by the Canadian Bar Association and relates generally to the issue of how much discretion a PR should have in terms of providing information to those who may be entitled to a distribution of estate property:[138]

> In designing a new estate administration statute, someone should look at the court's existing presumption that an executor's action is correct. This presumption puts the onus on a wronged claimant to prove the executor did something wrong; that can be very difficult. Clearly stating positive PR duties with court enforcement of performance might be a better way.

[135] Finally, it would be relatively easy for a PR to understand a requirement to provide a copy of the will to any beneficiary named in it as there would be no need for the PR to determine whether a beneficiary is residuary or non-residuary. This classification is not always obvious.

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[137] Alberta Justice Legislative Reform, *Results from the Administration of Estates Survey* (June 2010) at 4. This was a joint initiative with the Alberta Law Reform Institute. The survey was sent to members of the Canadian Bar Association, Alberta Branch, wills and estates sections.

[138] ALRI counsel notes, "CBA, Wills, Estates and Trusts" (North Section Meeting at Edmonton, 14 December 2010) [unpublished].

3. REASONS TO WITHHOLD THE WILL

[136] There are also a number of reasons why a copy of the will should not be provided to all beneficiaries. First, the nature of a specific beneficiary's entitlement to estate property is different than a residuary beneficiary's interest. A residuary beneficiary has a greater interest in understanding the entire scheme of gifts set out in the will as the residuary beneficiary takes only after the specific gifts have been dealt with. In comparison, a specific beneficiary will generally only be concerned with the specific gift left to them and need not understand the entire scheme of gifts. Further, if the specific beneficiary's gift is no longer available in the estate, the specific beneficiary is entitled to an accounting to explain the absence of the gift. Second, there are concerns about protecting privacy especially in cases where the deceased makes specific gifts to persons or entities who are not family members. Third, we received a suggestion that although it might make the PR's job easier to give all named beneficiaries a copy of the will, doing so may lead to there being too many copies out in circulation, especially if one considers how many wills a charity might receive.

[137] One of the persons canvassed suggested that instead of giving a copy of the will to a non-residuary beneficiary, perhaps the additional notice information should describe the gift and indicate that the non-residuary beneficiary can contact the PR if they have questions. In this way, the non-residuary beneficiary could ask for a copy of the will and the PR could then decide whether or not to provide one.

4. IS REFORM NEEDED?

[138] There are several benefits that may come from providing the will to all beneficiaries. However, there may also be negative consequences. It is impossible to weigh these factors in the absence of the facts of a specific case. ALRI's initial canvassing of views on the issue of providing a copy of the will to each beneficiary named in the will was not favourably received. However, there was no objection to providing the will to residuary beneficiaries, as is the current practice. Accordingly, ALRI recommends that the PR should provide a copy of the will to all residuary beneficiaries but that the decision to provide a copy to specific beneficiaries should

continue to be at the discretion of the PR. In exercising this discretion, the PR would do so in the context of the express duty to communicate.

D. Reporting to Beneficiaries

ISSUE 15

Should regular reporting to beneficiaries be included as a core task?

[139] At present there is no statutory or common law requirement for the PR to actively report to beneficiaries. Unless the PR brings a court application for formal authority, beneficiaries may hear nothing from the PR before the estate is distributed. By then, it may be too late for beneficiaries to properly monitor their interests or the PR's actions. As noted earlier, a beneficiary can ask to inspect the accounts and has the right to apply for the accounts to be passed by the court.[139] Again, this requires the beneficiaries to suspect that something may be amiss.

[140] The major reporting requirement is under the Rules which require a PR to prepare and give financial statements to the beneficiaries. Rule 97 requires the accounting "at regular intervals" and at least every two years. Rule 98 specifies the contents of the required financial statements, including an inventory.

a. Other jurisdictions

[141] For the most part, other jurisdictions have a similar system of reactive reporting, requiring the PR to report information or give access to the accounts only if a beneficiary asks. In Manitoba, there is a provision that a beneficiary, as an interested person, may request information about an asset or assets of the deceased in addition to what is described in the inventory or valuation.[140]

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[139] Ontario Report at 42.

[140] Manitoba, *Court of Queen's Bench Rules*, r 74.06.1(1) "Any interested person, including a creditor, who requires information about (a) the assets of a deceased; or (b) a specific asset of the deceased; beyond what is described in the inventory and valuation of the property of the deceased ... may provide a written request..."

[142] In England, the requirement is that a PR must account and/or show an inventory when required to do so by the court. Section 25(b) of the UK Act reads "... when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court." In general, an accounting or an inventory is only required as a result of an application.[141]

[143] Some Australian jurisdictions only require the passing of accounts when requested by the court,[142] other jurisdictions require accounts to be passed in every case,[143] and finally, some states require a mandatory passing of accounts only for certain types of PRs.[144]

[144] With respect to law reform proposals, the Ontario Law Reform Commission has recommended that legislation should include a right on the part of beneficiaries to inspect all the records in the possession of the PR relating to the estate. Thus, in addition to accounts, a beneficiary would have the right to inspect all documents concerning the estate that are in the possession or control of the PR. The Commission recommended that the beneficiaries should be able to take a copy of the records at their own expense. The right of access would be available after reasonable notice to the PR.[145]

[145] The Australian National Committee has also recommended that a provision on access to information be included in estate administration legislation. The Committee stated that such a provision would encourage transparency in estate administration and assist with reducing disagreements and litigation.

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[141] John Ross Martyn & Nicolas Craddick, eds, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate*, 19th ed, (London: Sweet & Maxwell, 2008) at 61-10.

[142] *Administration and Probate Act 1929* (ACT), s 58; *Administration and Probate Act* (NT), s 89; Queensland Act, s 52; *Administration and Probate Act 1935* (Tas), s 26. However, a PR in Tasmania who advertises for claimants must file accounts, see s 56.

[143] *Administration Act 1903* (WA), s 43.

[144] *Administration and Probate Act 1919* (SA), s 56(1), the provision only applies to administrators; *Probate and Administration Act 1898* (NSW), s 85, PRs who are creditors of the estate, who are guardians of a minor beneficiary, where a substantial part of the estate will go to a charity, or who are randomly selected by the courts must file accounts; *Administration and Probate Act 1958* (Vic), s 28(1), a creditor with a grant must pass accounts.

[145] Ontario Report at 47.

[146] The Committee raised a point that was not considered by the Ontario Law Reform Commission. Should access by a beneficiary to information be confined to only the information that is relevant to that beneficiary's interests? Although this would follow the common law, it might lead to arguments over relevancy. Therefore, the Committee recommended that all beneficiaries be given access to all the information. Access should be granted on reasonable notice to the PR and the cost of obtaining copies should be borne by the beneficiary.[146]

b. Recommendations for reform

[147] ALRI recommends that PRs be required to give beneficiaries written progress reports at periodic intervals. The content of these reports would be open-ended as it would depend upon the particular circumstances of the administration. However, they should detail the steps taken by the PR to administer the estate. Requiring regular reporting is consistent with the PR creating and maintaining accounts. It is anticipated that regular reporting will reduce some of the problems that arise when beneficiaries are left in the dark as to the progress of the estate administration.

[148] As well as providing the beneficiaries with information, a regular reporting requirement might be motivation for PRs to act promptly. Writing to beneficiaries to inform them that you have not taken any steps in administration would probably not be a palatable prospect for most PRs. Thus, regular reporting might help to address the issue of delays in estate administration as well.

[149] The requirement for a progress report could be tied to the completion of certain tasks on the statutory list. However, this does not seem a practical alternative as the time it takes to complete tasks varies with the complexity of the estate and the abilities and inclinations of the individual PR. Given this, ARLI recommends that a progress report be given at six months following the death, at one year following the death, and at subsequent yearly intervals.

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[146] Queensland Report, vol 1, at paras 11.201-11.206.

[150] ALRI also recommends that beneficiaries of specific gifts be given progress reports as well. The specific beneficiaries have an interest in seeing that the estate is administered properly and in a timely manner. In addition, communicating with the specific beneficiaries on a regular basis prevents the scenario where the specific beneficiaries are surprised to learn at the end of the administration that they will not be receiving their gifts after all. However, once specific beneficiaries have received their gifts, further progress reports need not be provided to those beneficiaries.

[151] Beneficiaries would still have the right to inspect accounts if needed. However, with regular reports by the PR there should be less need to request formal inspection.

E. Notice to Immediate Family Members Who Are Not Will Beneficiaries

ISSUE 16

Should the PR be required to provide notice to immediate family members of the deceased who are not will beneficiaries?

[152] A difficult issue is whether the PR should provide any information regarding the estate administration to immediate family members that the deceased did not name in the will. Immediate family members would include adult children, parents and siblings.

[153] There is no current provision to require notice to immediate family members not named in a will unless they would have a claim for support under the WSA. The deceased's immediate family have the right to require that a will be proved in a formal court proceeding.[147] This right is not eliminated by the usual probate process (which involves proof of the will in common form) or the passage of time.[148] In Alberta, consistent with other provinces, this right is reflected in rules which state that any person interested in the estate, which includes adult children and heirs on

[147] *In the Matter of the Estate of Fanny Hayward Crawford, Deceased* (29 July 1988), Alberta (Surr Ct) at 2 with reference to *Merryweather v Turner*, (1844) 163 ER 907 and *Bell v Armstrong*, (1822) 162 ER 129.

[148] Halisbury's, note 136, at HWE 229 with reference to a number of cases at notes 3, 4, 5. See also *Bell v Armstrong*, (1822) 162 ER 129 at 372.

intestacy,[149] can apply to the court for formal proof of the will, or other remedies, to ensure that the estate is being properly administered by the appropriate PR.[150]

1. REASONS TO PROVIDE NOTICE

[154] There are a number of reasons that support providing notice to immediate family members even where they are not beneficiaries under the will. First, as a practical matter, it seems appropriate in the context of concluding the deceased's affairs that the PR would communicate with the adult children, parents and siblings of the deceased, particularly since these persons may be the deceased's successors in interests in non-estate property by virtue of contract, licence or law and may not otherwise know that they have succeeded.

[155] Second, even if the deceased's immediate family are otherwise aware of the situation, receiving notice from the PR creates an opportunity for them to provide information to the PR that may facilitate the timely gathering and administration of the estate. For example, these persons may know about property owned by the deceased that is not in or near the place the deceased was living at the time of death, specific creditors, or how to get in touch with beneficiaries who are named in the will.

[156] A third point in support of contacting immediate family is that it may assist the PR to conclude the estate administration in a timely manner in the event of an incomplete or failed testamentary gift because those entitled to such property would already be aware of the administration process. Finally, it may reduce the risk of litigation against the estate during and subsequent to administration if the PR engages in transparent and non-adversarial communications with persons who are entitled to challenge a will up front.[151]

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[149] Rules, r 78 (b), (g).

[150] Rules, r 75.

[151] Halsbury's, note 136, at HWE 229, note 7 states that "wills are proved in solemn form, sometimes in ordinary circumstances by executors who wish to obviate the risk of any subsequent attack on a will."

2. REASONS NOT TO PROVIDE NOTICE

[157] On the other hand, there are three main reasons against the proposition that a PR should notify the deceased's immediate family members who are not named in the will. First, it could be unduly onerous and difficult for the PR to identify, locate and notify all these persons. Second, the benefits to be gained by contacting these persons, in terms of supporting the underlying purpose and reasons for giving notice, are not substantial.

[158] Third, in theory it may seem appropriate that a PR should inform the deceased's immediate family of the death and the estate administration. In practice, however, information of this type may lead to discord and litigation. If the deceased's relationship with these persons was such that they would not know of the death, and further, if the deceased did not want to give any property to these persons, why should the PR be responsible for the delivery of such unpleasant messages?

3. IS REFORM NEEDED?

[159] ALRI recommends that it be left to the discretion of the PR whether or not to provide notice to immediate family members who are not beneficiaries under the will. In some cases it will facilitate the administration of the estate for the PR to notify immediate family members. However, in other situations, there might be little, if any, gain; it may even be detrimental to the timely administration of the estate for the PR to take this step.

F. Communicating with Other Interested Persons

ISSUE 17

Should the PR be required to communicate with other interested persons?

[160] The earlier discussion focussed on beneficiaries. The question here is to what extent a PR should be required to communicate with other interested persons. Interested persons may bring a court application to have the accounts of the PR passed or may apply to the court on a

contested matter.[152] However, in some jurisdictions estate administration legislation sets out alternative methods of obtaining information.

1. OTHER JURISDICTIONS

[161] In Manitoba, there is a provision that an interested person may request information about an asset or assets of the deceased in addition to what is described in the inventory and valuation. The provision states:[153]

> 74.06.1(1) Any interested person, including a creditor, who requires information about
>
> (a) the assets of a deceased; or
>
> (b) a specific asset of the deceased;
>
> beyond what is described in the inventory and valuation of the property of the deceased ... may provide a written request to the executor or administrator, setting out the interest of the person and the information requested.
>
> 74.06.1(2) Within 21 days after receiving the request, the executor or administrator shall provide the person making the request with the requested information in writing or a statement in writing refusing to provide the requested information and the reasons for the refusal.
>
> 74.06.1(3) The court may, on motion, make an order requiring the executor or administrator to provide the person making the request with the requested information within a specified time, unless the court is satisfied that
>
> (a) the executor or administrator has provided a sufficiently detailed inventory of the assets of the deceased or has disclosed sufficient information about the asset the of the deceased; or
>
> (b) the request is frivolous, vexatious or made for an improper purpose.

[152] Act, s 45; Rules, rr 55, 57.

[153] Manitoba, *Court of Queen's Bench Rules*, r 74.06.1.

[162] With respect to access to documents by other interested persons, the Australian National Committee recommended that family relief applicants and creditors should have the ability to apply to the court for access to documents.[154] The proposed section reads as follows:

> 616 Access to information held by PR—family provision applicants and creditors
>
> (1) This section applies to documents the PR is required to keep under section 403.
>
> (2) A person eligible to apply for provision out of the deceased person's estate under [insert local equivalent of the Succession Act 1981, section 41], or a creditor of the estate, may apply to the Supreme Court for access to the documents.
>
> (3) The Supreme Court may order that the PR give the person or creditor access to all or some of the documents as the court considers appropriate.
>
> *Examples of giving access—*
>
> - allowing inspection of the documents
> - providing copies of the documents
>
> (4) If the Supreme Court orders access under subsection (3), the right to access may be exercised by the person or creditor personally, or by the person's or creditor's agent.
>
> (5) The person or creditor must pay to the PR the PR's reasonable costs of providing the access.

[163] This type of provision was also recommended by the Ontario Law Reform Commission who noted that these persons have interests which are opposed to the estate and beneficiaries, thus making it appropriate that a court application be made.[155]

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[154] New South Wales Report at 6.45-6.47.

[155] Ontario Report at 48.

2. RECOMMENDATION FOR REFORM

[164] It is ALRI's recommendation that other interested persons should be able to request information from a PR. The PR should have the discretion to grant or deny. In exercising this discretion to provide the information, the PR would weigh the benefits of open communication in the particular circumstances against with any potential harm that might arise from communicating the information. Where the PR declines to provide the requested information, the interested person would still be able to apply to the court to gain access to it. However, the PR may still be required to respond to interested persons under other legislation, and may be required to provide specific information to a person who commences a claim under that legislation. Such specific requirements are not affected by the discretion we recommend for a PR in estate administration.

CHAPTER 6

Banks and Financial Institutions

A. Introduction

[165] This chapter examines the role of banks and other financial institutions in the estate administration process. It analyzes the feedback received during the consultations concerning financial institutions and examines the possibilities for law reform. It concludes that many of the concerns expressed would be better addressed through education of financial institutions and policy changes, rather than through legislative reform.

[166] Consultations revealed that PRs experience difficulty in getting information about the deceased's assets or access to assets from financial institutions. Financial institutions cite privacy concerns or insist on a formal grant of authority before releasing the relevant information about a deceased's assets. Even where there is a formal authority, there are reported difficulties in having the financial institutions release funds in a timely manner. Financial institutions have complex internal procedures that take time to complete even after formal authority has been obtained. In addition, every financial institution has different requirements when it comes to the release of assets.

[167] As an initial observation, it is important to note which level of government has regulatory authority over which type of financial institution. The federal government has jurisdiction over banks according to the *Constitution Act, 1867*.[156] As such, provincial law reform efforts will have a very limited reach with respect to the conduct of banks. Meanwhile, other financial institutions, such as credit unions and caisses populaires, are largely regulated by provincial governments. Accordingly, provincial law reform could have a greater impact on the latter's behaviour. This raises the question of the desirability of having a

[156] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(15), reprinted in RSC 1985, App II, No 5.

potentially different procedure apply to banks as compared to credit unions in the estate administration context.

B. Getting Information About the Assets

ISSUE 18

What should be done when a financial institution asserts privacy concerns in refusing to provide information to a PR?

[168] One of the PR's tasks is to prepare an inventory of the estate. Preparing the inventory requires the PR to obtain information about the deceased's finances from banks. The feedback from the consultations was that financial institutions object to providing this information to a PR on the basis of privacy. In terms of privacy legislation the *Personal Information Protection and Electronic Documents Act* governs their ability to share information, as banks are federally regulated.[157] Principle 4.3.6 of Schedule 1 of PIPEDA contemplates that consent to disclose could be given by an *authorized* representative such, as a PR. The release of information by provincially regulated bodies, such as most credit unions, is governed by the provincial *Personal Information Protection Act*.[158] Section 61(1)(d)(i) provides:

> **Exercise of rights by other persons**
>
> **61(1)** Any right or power conferred on an individual by this Act may be exercised
>
> ...
>
> (d) if the individual is deceased
>
> (i) by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate;

[169] The question is when is a person an "authorized" representative or PR for an estate under either the federal or provincial legislation? There

[157] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

[158] *Personal Information Protection Act*, SA 2003, c P-6.5.

does not appear to be any order of either the Federal or Alberta Privacy Commissioner that has addressed this issue.

[170] If one considers the source of authority, an executor named in the will is "authorized" by the will to act as a representative of an estate. Where there is no will or no executor acting under a will then it would be up to the court to "authorize" a person by issuing a grant. We note that our recommendation to give an administrator authority to act from death would also provide "authorization".

[171] From the consultations it would appear that there are two different scenarios where a bank or other financial institution will refuse to provide information on the basis of privacy concerns:

1. When a person is authorized as a PR.
2. Pending authorization as a PR.

Each of these will be examined in turn.

1. WHEN A PERSON IS AUTHORIZED AS A PR

[172] Even if a PR has been named in the will, a financial institution may be reluctant to act without probate because of the risk of a subsequent will or a challenge based on duress or lack of capacity. In the view of the ALRI Project Advisory Committee, this was not a very common scenario. Where it does occur the issue should be addressed by education for financial institutions, so that they are clear when a person is authorized. The Committee noted that there may be some practical concerns about how to educate financial institutions.

2. PENDING AUTHORIZATION AS A PR

[173] The more difficult case is the catch-22 scenario where the appointment of a PR depends on a formal grant of authority and the financial institution is unwilling to provide the information needed in order to complete the court application.

[174] Under the current legislation, there are ways to work around this problem. For example, a nominal figure can be entered into the inventory, until the grant is issued and the real figure can be ascertained.

Alternatively, a reasonable estimate can be entered based on bank statements at the deceased's home or available through internet access.

[175] Where these practical alternatives are not available, it would be possible for the person seeking the information to apply to the court for an interim order for a limited appointment as PR in order to obtain the necessary information to facilitate the grant application procedure.

[176] If the new estate administration legislation were to provide the person administering the estate with the authority from death, this would resolve or reduce the problem. It would then be a question of educating the financial institutions such that they accept that such persons are authorized to receive information.

3. IS REFORM NEEDED?

[177] Despite the problems that have been noted, most difficulties appear to be the result of misunderstandings of the current law. As it stands, the law provides an appropriate response. Problems are also expected to arise less frequently given the reduced level of detail that will be required in preparing an inventory for an application for formal authority. To the extent that change is needed it would be best brought about through education.

C. Access to Assets Held by Financial Institutions

ISSUE 19

Should anything be done to facilitate the release of assets held by a financial institution? What is a reasonable delay on the part of financial institutions?

[178] During the consultations there were complaints regarding the length of time it takes for a financial institution to release assets to either a PR or beneficiary for distribution. It is not clear from the submissions how widespread the problem is or what length of time would be considered reasonable.

[179] The problem appears to be that banks and other financial institutions have developed internal procedures – such as requiring that a

request go through its estate department at head office – and this adds weeks to what should otherwise be a straight forward request.

[180] Where a bank is presented with a formal grant of authority, then one would expect the delays would be relatively short (some procedures would be expected to establish the validity of the order and the identity of the PR or the beneficiary). While the *Bank Act* and the *Credit Union Act* are silent about the types of procedures that should be followed in giving a PR access to the assets of an estate, they do provide detail with respect to the transmission of assets to a named beneficiary.[159] For example, where the asset is a deposit or other property held as security, section 460 of the *Bank Act* requires an affidavit or declaration signed by the beneficiary and an authenticated copy under the seal of the court or authority of the will, testamentary instrument, grant of probate or other similar document.[160] By analogy, one would expect that if similar documents were presented by a PR then the assets should be released.

[181] However, where there is something short of a formal grant of authority it is reasonable for banks to refuse to release assets or to put in place a system of guarantees and undertakings in order to limit their potential liability and the risk of fraud. Typically, where there is something short of formal authority a bank will pay amounts directly to

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[159] *Bank Act*, SC 1991, c 46; *Credit Union Act*, RSA 2000, c C-32, s 116.

[160] *Bank Act*, SC 1991, c 46, s 460:

> Transmission in case of death
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> **460. (1)** Where the transmission of a debt owing by a bank by reason of a deposit, of property held by a bank as security or for safe-keeping or of rights with respect to a safety deposit box and property deposited therein takes place because of the death of a person, the delivery to the bank of
>
> (*a*) an affidavit or declaration in writing in form satisfactory to the bank signed by or on behalf of a person claiming by virtue of the transmission stating the nature and effect of the transmission, and
>
> (*b*) one of the following documents, namely,
>
> (i) when the claim is based on a will or other testamentary instrument or on a grant of probate thereof or on such a grant and letters testamentary or other document of like import or on a grant of letters of administration or other document of like import, purporting to be issued by any court or authority in Canada or elsewhere, an authenticated copy or certificate thereof under the seal of the court or authority without proof of the authenticity of the seal or other proof, or
>
> (ii) when the claim is based on a notarial will, an authenticated copy thereof,
>
> is sufficient justification and authority for giving effect to the transmission in accordance with the claim.
>
> *Idem*
>
> **(2)** Nothing in subsection (1) shall be construed to prevent a bank from refusing to give effect to a transmission until there has been delivered to the bank such documentary or other evidence of or in connection with the transmission as it may deem requisite.

creditors as needed to manage the estate. It is also possible to obtain an emergency grant of authority from a court where, for example, a mortgage payment must be made or the estate will have to sell the house where a dependent of the deceased is still living.

[182] Possible options to address this issue include:

(a) A legislative option – a requirement in the estate administration legislation that assets must be released to a PR or a beneficiary within a reasonable time when their authority is presented. For a number of reasons, this option does not appear to be viable. First, the reach of the legislative option would be limited to provincially regulated financial institutions. Thus, banks would not be affected. Further, it is not all that clear that in every case the delay resulting from internal bank procedures is unreasonable.

(b) Education/ policy option – another possibility would be to work with the banks and financial institutions to try to outline what a reasonable timeframe might be and what types of procedures and safeguards are appropriate. This would appear to be a more viable option as it has the potential to reach all of the financial institutions in the province and could result in more standardized procedures. The difficulty, of course, is whether financial institutions would be amenable to this type of approach and how best to reach them.

[183] Inevitably there will be some delay and also internal procedures that must be complied with before estate assets can be released, even to a PR with formal authority. Short of a formal authority, a bank or financial institution should not be required to release assets unless there was an emergency grant. In some cases, the financial institution may wish to meet the expenses of the estate by direct payment to those persons (e.g. funeral directors) providing services to the estate.

[184] If banks want to pay out assets informally on the basis of some indemnity or undertaking, this is a matter of policy for financial institutions. Currently banks, as a matter of policy, will sometimes release assets below a certain dollar figure (usually around $30,000) without a formal authority where they know either the deceased or the PR and where an indemnity is signed. The amount and the procedure vary

between banks and amongst branches. There is no need for any legislative reform in this area.

Deadline for comments on the issues raised in this document is November 30, 2011